

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
PETITION OF IVYMOUNT SCHOOL, INC.,

Petitioner

Steven Goley
Sari Hornstein
John Kennedy
Keely Lauretti
Lee Oppenheim
Chris Parts
Janet Wintrol

For the Petitioner

David D. Freishtat, Esq.
Anne Marie Vassallo, Esq.
Counsel for the Petitioner

* * * * *

Martin Klauber, Esquire
People's Counsel for Montgomery County

In Support of the Petition

* * * * *

John Erzen
Jerrold Garson
Andrew Kavounis
Stephen F. Riley
Penny Somer-Greif
Peter Stocksclaeder

In Opposition to the Petition

* * * * *

Board of Appeals Case No. S-2746
(OZAH Referral No. 09-17)

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition S-2746, filed January 22, 2009, requests a special exception under Section 59-G-2.19 for a private educational institution, to be operated in an existing structure (proposed for renovation and expansion) located at 11616 Seven Locks Road, known as Lot 1, Block 4, Regency Estates subdivision, in the R-90 Zone. The Petitioner, Ivymount School, Inc., intends to use the subject property as an annex to its main campus, which is adjacent to the south at 11614 Seven Locks Road.

Technical Staff of the Maryland-National Capital Park & Planning Commission ("M-NCPPC") reviewed the present petition and, in a report dated May 22, 2009, recommended approval with three conditions. See Ex. 20. At its regular meeting on June 4, 2009, the Montgomery County Planning Board voted 5 to 0 to recommend approval. See Ex. 20.

On February 17, 2009 the Board of Appeals (“Board”) scheduled a public hearing in this matter for June 15, 2009, to be conducted by a hearing examiner from the Office of Zoning and Administrative Hearings. The hearing was convened as scheduled, at which time testimony and other evidence were submitted in support of and in opposition to the proposed special exception. The record was held open to receive additional submissions from the Petitioner and reopened twice, first to complete the initial post-hearing submissions and then to accept site plans and landscape plans that were corrected to show consistently the location of proposed lighting. The record finally closed on September 10, 2009.

II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property and Neighborhood

The subject property contains approximately 9,639 square feet of land. It is located on the west side of Seven Locks Road, just south of Gainsborough Road, in an R-90 Zone. The site is roughly rectangular in shape and slopes towards its western boundary, with a drop-off from the front of the property to the rear of approximately ten feet. The property is developed with an existing one-and-a-half-story, split-level, brick single-family home of 2,875 square feet, which was built in about 1963. The house has a walk-out basement at the rear and a semi-circular driveway providing two points of vehicular access to Seven Locks Road. Tall evergreens along the western and southern boundaries buffer the site from the parking area for the main Ivymount School campus, adjacent to the south. Additional vegetation includes trees, overgrown shrubs and grass.

To the south and west, the subject site abuts the main Ivymount campus.¹ To the north, it abuts a property that is residential in zoning and appearance, but houses the Young Israel Ezras Israel of Potomac, a religious institution. To the east, the subject site confronts single-family detached dwellings across Seven Locks Road. The photographs that follow depict the site and its immediate vicinity.

¹ The Staff Report states on page three that the subject site abuts a community swimming pool to the west, but the evidence clearly indicates that the swim club abuts the western edge of the main Ivymount campus, not the property that is the subject of the present special exception request.

Front of Subject Site, Ex. 27(b)



Rear of Subject Site, Ex. 27(c)



Seven Locks Road Looking North from Subject Site, Ex. 27(d)



Seven Locks Road Looking South from Subject Site, Ex. 27(f)



Subject Property and Adjoining Synagogue, Ex. 27(e)



Looking Down Driveway of Main Ivymount Campus, from Staff Report Attachment 5



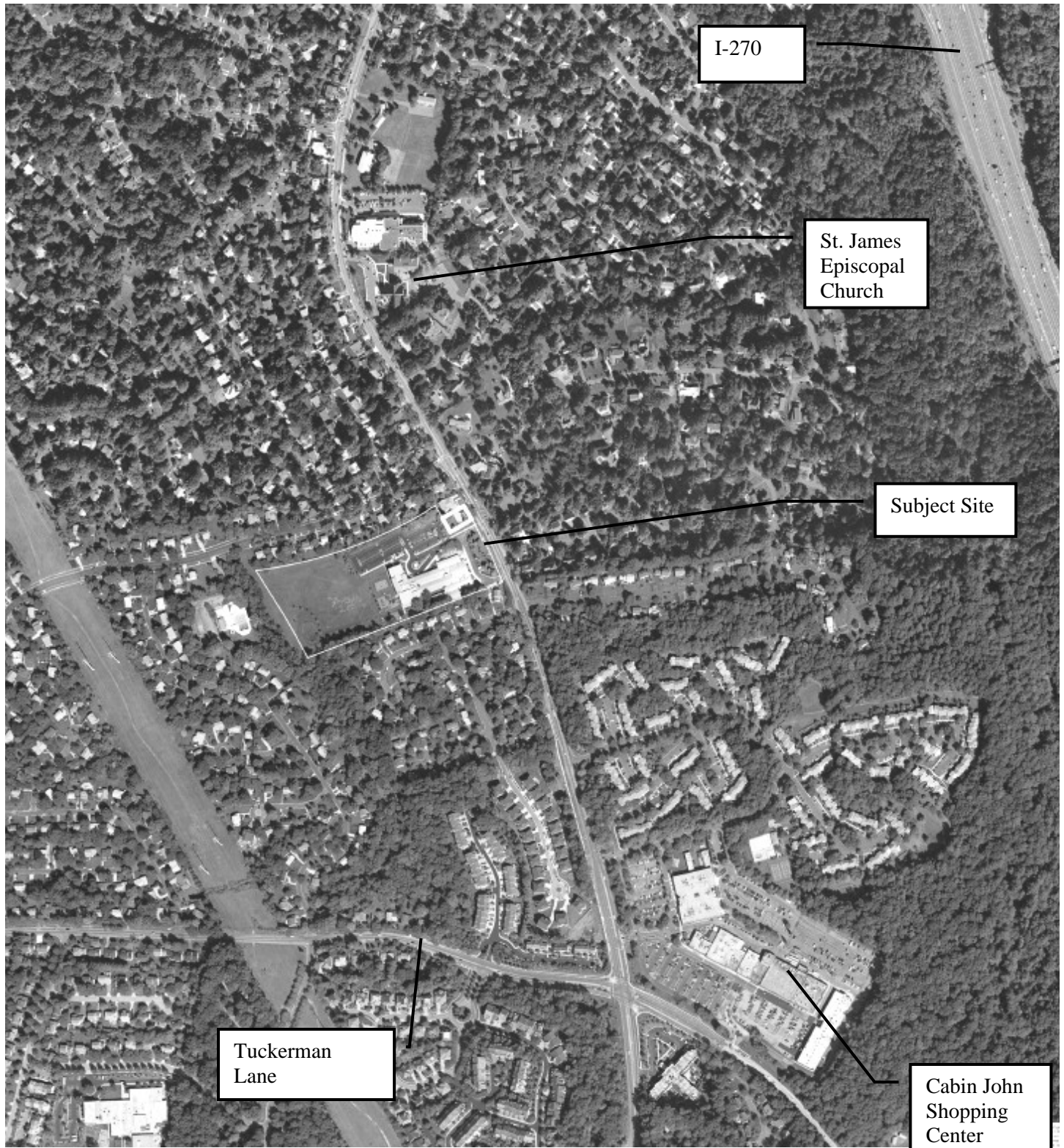
Technical Staff described the general neighborhood of the site as an area bounded generally by Gainsborough Road to the north, Deborah Drive to the west, Willerburn Acres to the east (a subdivision across Seven Locks Road from the subject site and extending to the east) and Tuckerman Lane to the south. The Hearing Examiner considers this general neighborhood appropriate except to the north, where Gainsborough Road is too close – only 200 feet away -- to be a good northern edge. The Hearing Examiner would extend the general neighborhood to the north to a point even with St. James Episcopal Church, which is perhaps 800 to 1,000 feet north of Gainsborough Road.

The general neighborhood consists primarily of single-family detached and attached homes in the R-90 and R-90/TDR Zones, although the Cabin John Mall at the corner of Seven Locks Road and Tuckerman Lane is classified under the RMX-2 Zone, and a small piece of property adjacent to the mall is classified under the RT (townhouse) Zone. Several special exceptions have been identified in the general neighborhood, including many stores in Cabin John Mall, a community swimming pool west of the main Ivymount campus and a couple of home offices. The neighborhood also has several places of worship, some of which contain private schools. Nearby but outside the defined general neighborhood are Churchill High School and Hoover and Cabin John Middle Schools.

The relationship of the subject property to other nearby land uses can be seen on the aerial map on the next page, which has been annotated to show the locations of special exceptions.

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Aerial Photograph of General Neighborhood, from Ex. 25, Annotated by Hearing Examiner



B. Master Plan

The subject property is within the area covered by the *2002 Potomac Subregion Master Plan* (the “Master Plan”). Technical Staff considers the proposed special exception to be consistent with the Master Plan, which makes little reference to the subject property except to recommend continued R-90 zoning. The R-90 Zone permits private educational institutions by special exception. Petitioner’s site planner/landscape architect, Keely Lauretti,² noted that the Master Plan recommended avoiding large numbers of special exceptions along major roads. Ms. Lauretti stated that there are no special exceptions on Seven Locks in the vicinity of the subject site, although other special exceptions do exist in the area. See Tr. at 79-81. The Hearing Examiner notes that Cabin John Mall, a major special exception site, fronts on Seven Locks a short distance from the subject site. The Hearing Examiner nonetheless sees no conflict with the Master Plan, regardless of whether Seven Locks is considered a “major road,” because the proposed special exception would preserve the residential appearance of the subject site and would not add to local traffic.

C. The Present and Proposed Uses

The Ivymount School is an award-winning, non-profit, non-sectarian, private school for special needs students, founded in 1961. The school has an integrated approach to learning that includes educational programs and therapeutic services for students ages 4 – 21 with serious developmental delays, learning disabilities, communication disorders, autism and/or multiple handicaps. See Ex. 3 at 2. As explained by the school’s Director, Janet Wintrol, Ivymount students come mostly from Montgomery County, but also from several other jurisdictions in the region. Almost all of the students are funded by local school systems, which refer students to Ivymount when their needs cannot be met in the public schools.

Ivymount leases its main campus from Montgomery County. The main campus was originally used as a public elementary school, but has been leased to Ivymount as a surplus school site since

² Ms. Lauretti was not designated an expert in land planning, so her testimony in areas outside landscape architecture and site planning is that of a lay witness.

1983. Prior to that time, Ivymount operated various parts of its programs at several locations in Montgomery County. Its programs were consolidated at the current main campus and later expanded to include activities such as an early-intervention pre-school program, called the Maddux School, for children ages 3 ½ to 6 who are at risk for learning difficulties in school. The Maddux School operates out of Ivymount's main campus, but many of its services are provided off-site at neighborhood pre-schools.³ Ivymount itself has a lower school, a middle school, a high school, a post-high school, an autism model program and an Asperger model program. Its student body extends to age 21 because federal law mandates education for special needs students through age 21. Ivymount and the Maddux School together currently have 240 students and 241 staff members.⁴ See Ex. 40. The Staff Report indicated that the school has approximately 290 students, which may include children at an on-site day care center that sub-leases space from Ivymount, called the Beverly Farms Child Day Care Center. See Staff Report at 2; Tr. at 32.

Ms. Wintrol explained that autistic students require one-on-one attention, partly due to aggressive behaviors that are a means of communication. She believes Ivymount has perfected its autism educational model and does a very good job with this program. She also mentioned the Asperger program, for students at the high end of the autism spectrum, who are very intelligent but have trouble with social cognition and organizational skills, and are often misdiagnosed as emotionally disturbed.

³ There was some inconsistency in Ms. Wintrol's testimony about the Maddux School. She stated that it occupied one wing of the main school building, but at another point described it as being entirely an off-site program, providing early intervention at local pre-schools to help prepare children at risk for learning difficulties to attend public school. *Comp. Tr.* at 34, 43. The Hearing Examiner concludes that the Maddux School operates both on and off-site. Although the details remain unclear, this piece of information is not central to the decision before the Board in this case.

⁴ Ivymount provided this enrollment information while objecting to its relevance. See Ex. 40 (and duplicate original identified as Exhibit 41). Ivymount provided the staffing information while objecting to its relevance and arguing that its staffing is preempted by state regulations. See *id.* Ivymount argued that because the main campus operates without a special exception, enrollment at the school as a whole is not relevant to the special exception proceeding. The Hearing Examiner requested this information and hereby overrules Ivymount's objection to its inclusion in the record. Basic information about Ivymount as a whole is relevant to the Board's understanding of the present application, because the subject property does not have the facilities to operate as a school independent of the main Ivymount campus, nor does it have sufficient land area to create such facilities.

Ms. Wintrol noted that students who stay through high school or post-high school receive a certificate. If the school thinks that a particular student could qualify for a high school diploma, they recommend that the student go to his or her local public school, or another placement that is more appropriate than Ivymount.

Ivymount purchased the subject property in 2007 after its owner, a long-time friend of the school, passed away. His family offered the school a right of first refusal to buy the house, and Ivymount's Board decided it would be worthwhile to acquire the additional space. Ivymount plans to use the subject site as an annex for its 18-to-21-year-old students, to provide more space for their vocational and behavioral programs. This would be accomplished with existing staff. Ms. Wintrol described the school's task with these young people as helping them realize that they are adults and need to function in the community. Ivymount has set up job sites at about 20 locations, many of them with volunteer jobs, to give the students work experiences and new learning environments. Right now, Ivymount has 36 students in the 18 to 21 age group. For each of them, the school has to find a job placement and send a job coach with the student, in hopes of fostering as much independence as possible. Ivymount has agreed to limit occupancy of the subject site to 40 students and 20 staff members.

Ms. Wintrol stated that morning and afternoon student drop-offs and pick-ups are planned to continue as they currently take place, at the main Ivymount campus. The only vehicle trips she anticipates at the annex are a van pulling up in the circular drive to take students to and from their job sites. The submitted Site Plan and Petitioner's written statement in support of its application state, in conflict with Ms. Wintrol's testimony, that the two parking spaces proposed in front of the annex would be used for drop-off and pick-up of students who would use the wheelchair ramp. See Ex. 16(a), General Note 12; Ex. 3 at 5. The Hearing Examiner credits Ms. Wintrol's testimony because she has direct knowledge of operational plans and was unequivocal that students housed in the annex would continue to arrive and depart on school buses using the main Ivymount campus. Moreover, the evidence about large numbers of school buses waiting on the shoulder of Seven Locks Road to enter

the subject site, and then crowding onto the site to deposit and pick up students, suggests it would be extremely impractical, if not impossible, for the school to attempt to have buses pull into the annex to drop off or pick up students in wheelchairs. The recommended conditions of approval include a requirement that all morning drop-offs and afternoon pick-ups must take place on the main Ivymount campus. Students can be safely transported to the annex, after the buses have left the main campus, through the parking lot and paved pathways. To avoid any ambiguity on this point, the Hearing Examiner recommends that Petitioner be required to remove the last sentence under General Note 12 on the Site Plan before the special exception can take effect.

Ivymount proposes to renovate and expand the existing home on the subject site to accommodate its educational and vocational programs. The project is proposed in three phases, to be completed over the course of four years. Phase One would consist of gutting the interior of the building and changing exterior landscaping and access. Interior renovations would include reinforcing the floors to accommodate additional weight, removing lead paint and asbestos, installing sprinklers and moving the staircases from the center of the building to the sides to create a larger room. See Tr. at 142, 148-49, 154. The school would maintain a full kitchen, and of course bathrooms. The exterior of the building would be unchanged except for three additional windows and a swinging door to replace a sliding door in the rear. Phase One would include widening the driveway and adding two handicapped-accessible parking spaces in front of the house. The net result would be paving most of the front yard, with pockets of shrubs and perennials at the corners of the house, and hedges to screen the new parking spaces and the large area of paving.

In Phase Two, Ivymount proposes an addition to the back of the building measuring 14 feet by 50 feet for the width of the building, adding 1,650 square feet of space to the first floor and walk-out basement. The front of the building would still have one story.

Phase Three proposes adding a second floor to the entire building for an additional 3,899 square feet. See Tr. at 142, 150; Ex. 5(d). The final building would contain approximately 8,297 square feet of space, almost triple the size of the existing house. The design would maintain the current brick

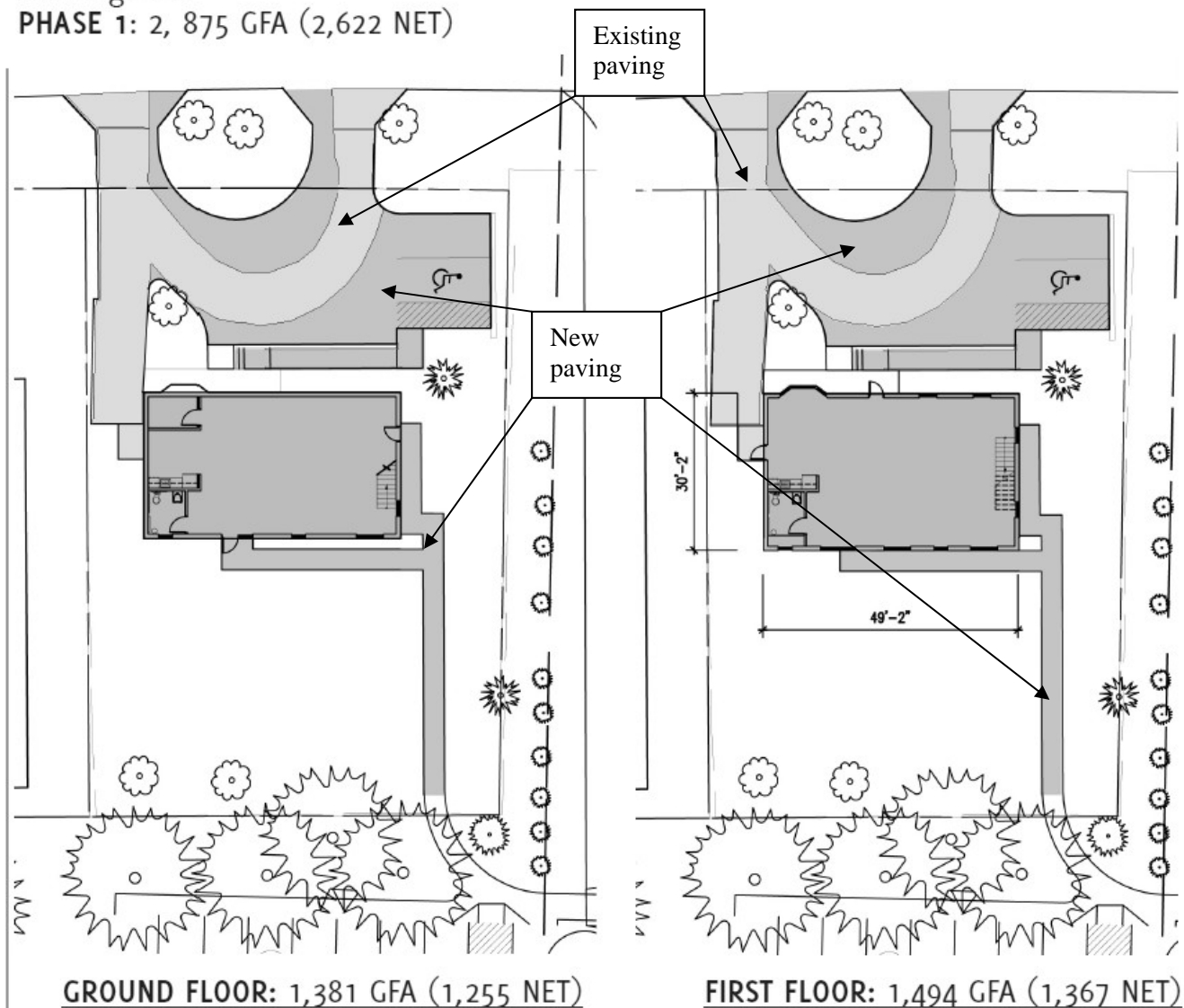
front along Seven Locks Road and would have a similar slope to the roof, to maintain a character consistent with other homes in the neighborhood. See Tr. at 142. After the final phase, the house would have two stories in the front and three in the rear, with brick along the front and part way back along the sides, and siding in the rear. The recommended conditions of approval include a condition memorializing Petitioner's stated intention to use materials that will be compatible with the existing building and the residential character of the neighborhood.

The phasing drawings on the next three pages show the changes proposed to the building and paving. Building elevations follow on page 16, and the site plans on pages 17 to 21.

Phase One: Interior Renovations; Front Parking and Circulation Area Increased. From Ex. 5(e)

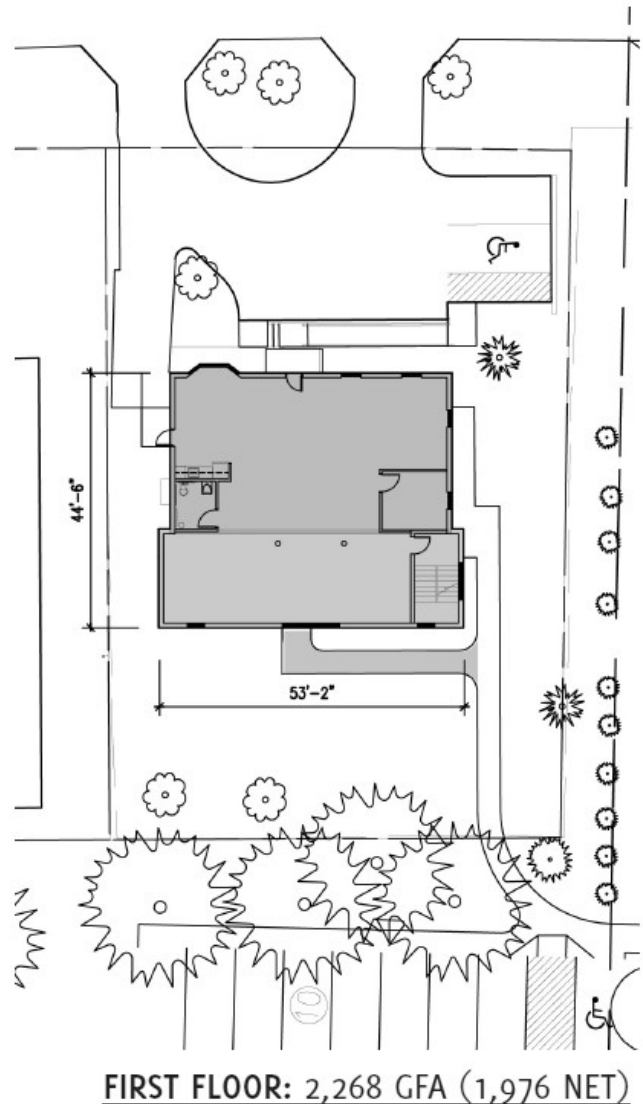
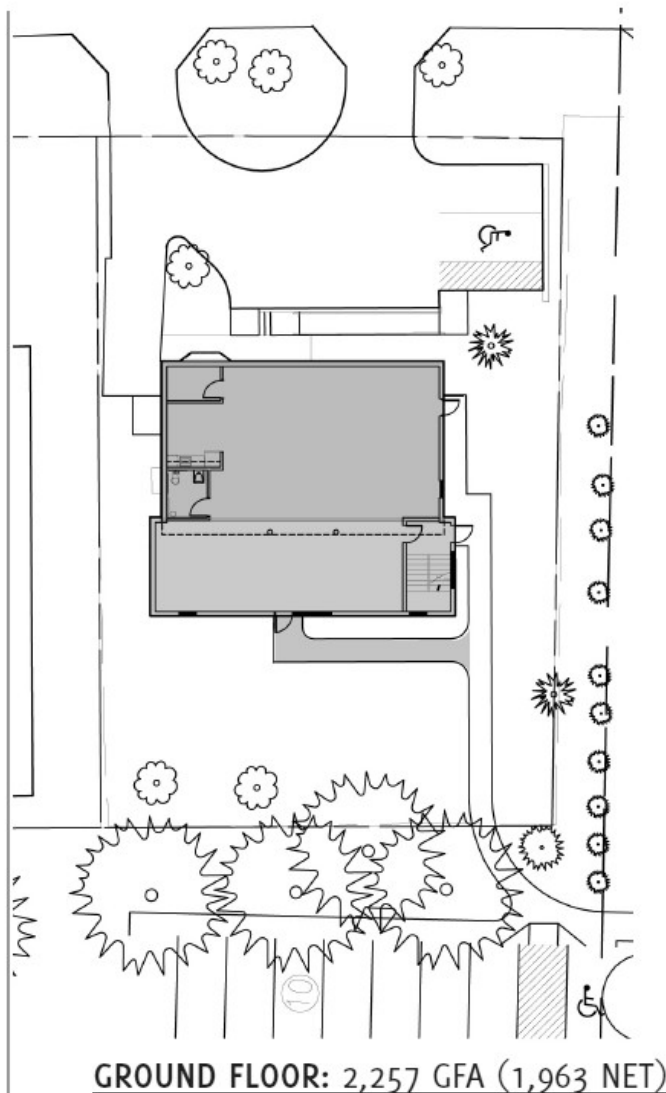
Phasing Plan

PHASE 1: 2, 875 GFA (2,622 NET)



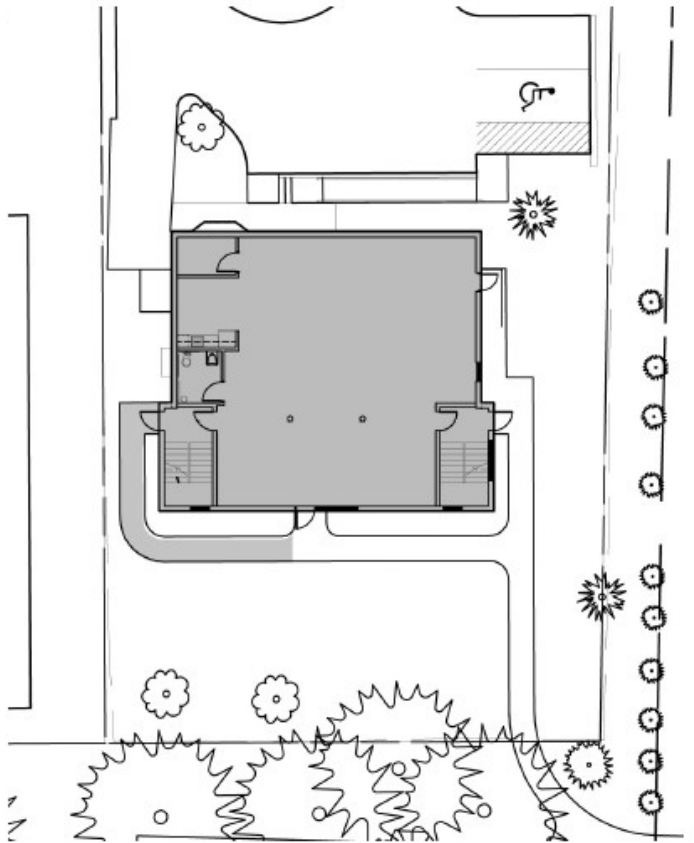
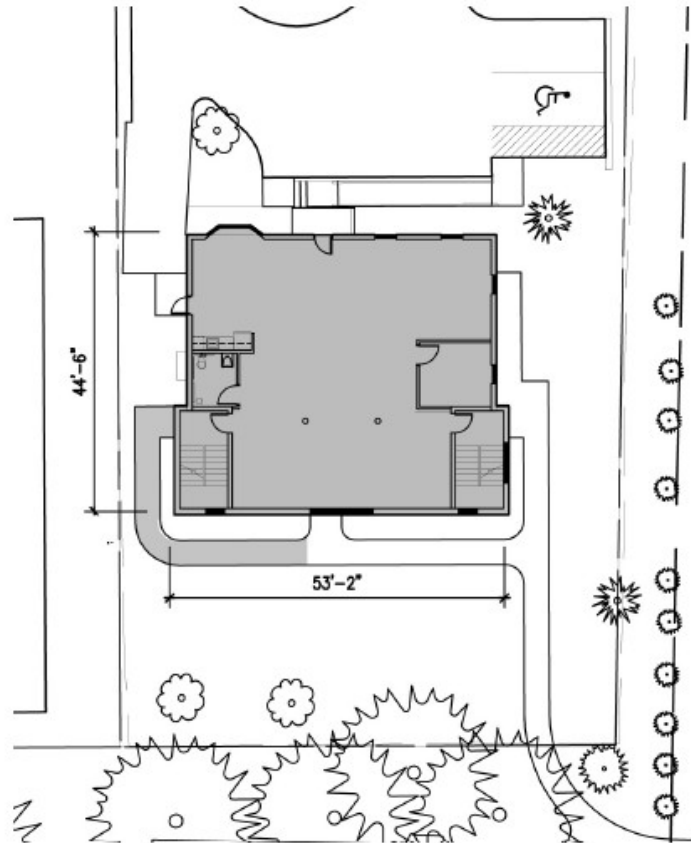
Phase Two: Rear Addition of 1,650 Square Feet. From Ex. 5(c)

Phasing Plan

PHASE 2: 4,525 GFA (3,939 NET)

Phase Three: Second-Story Addition to Entire Building, 3,899 Square Feet. From Ex. 5(d)

Phasing Plan

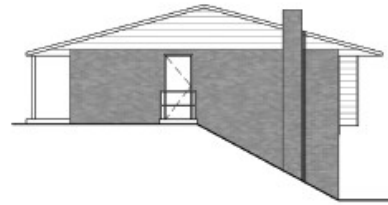
PHASE 3: 6,782 GFA (5,500 NET)**GROUND FLOOR: 2,257 GFA (1,829 NET)****FIRST FLOOR: 2,268 GFA (1,842 NET)**

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Phase One Building Elevations, from Ex. 5(a)



NorthEast Elevation



NorthWest Elevation



SouthWest Elevation

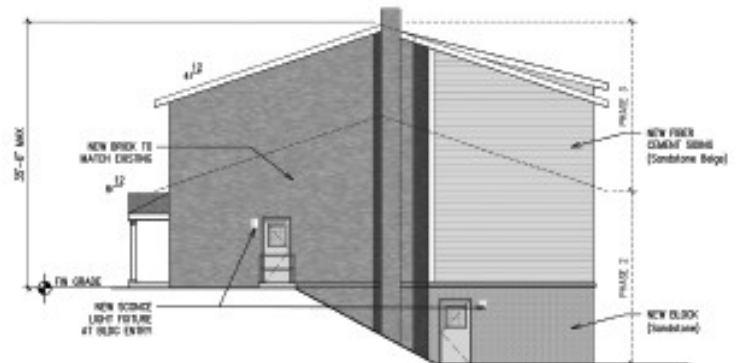


SouthEast Elevation

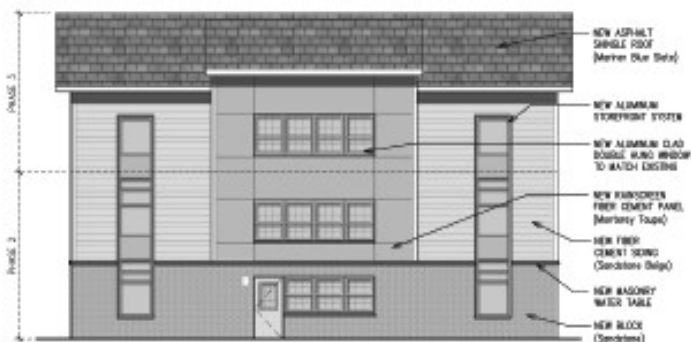
Phase Two Building Elevations, from Ex. 5(b)



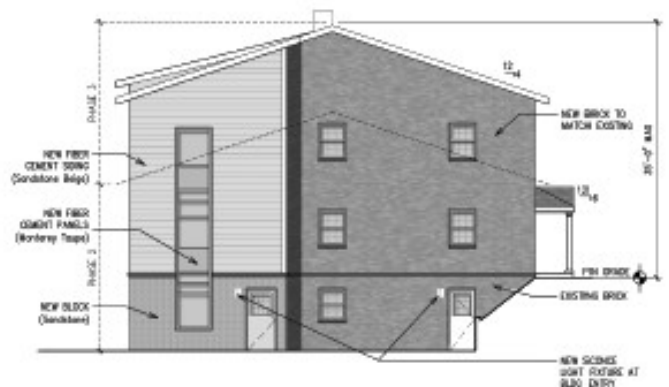
NorthEast Elevation



NorthWest Elevation



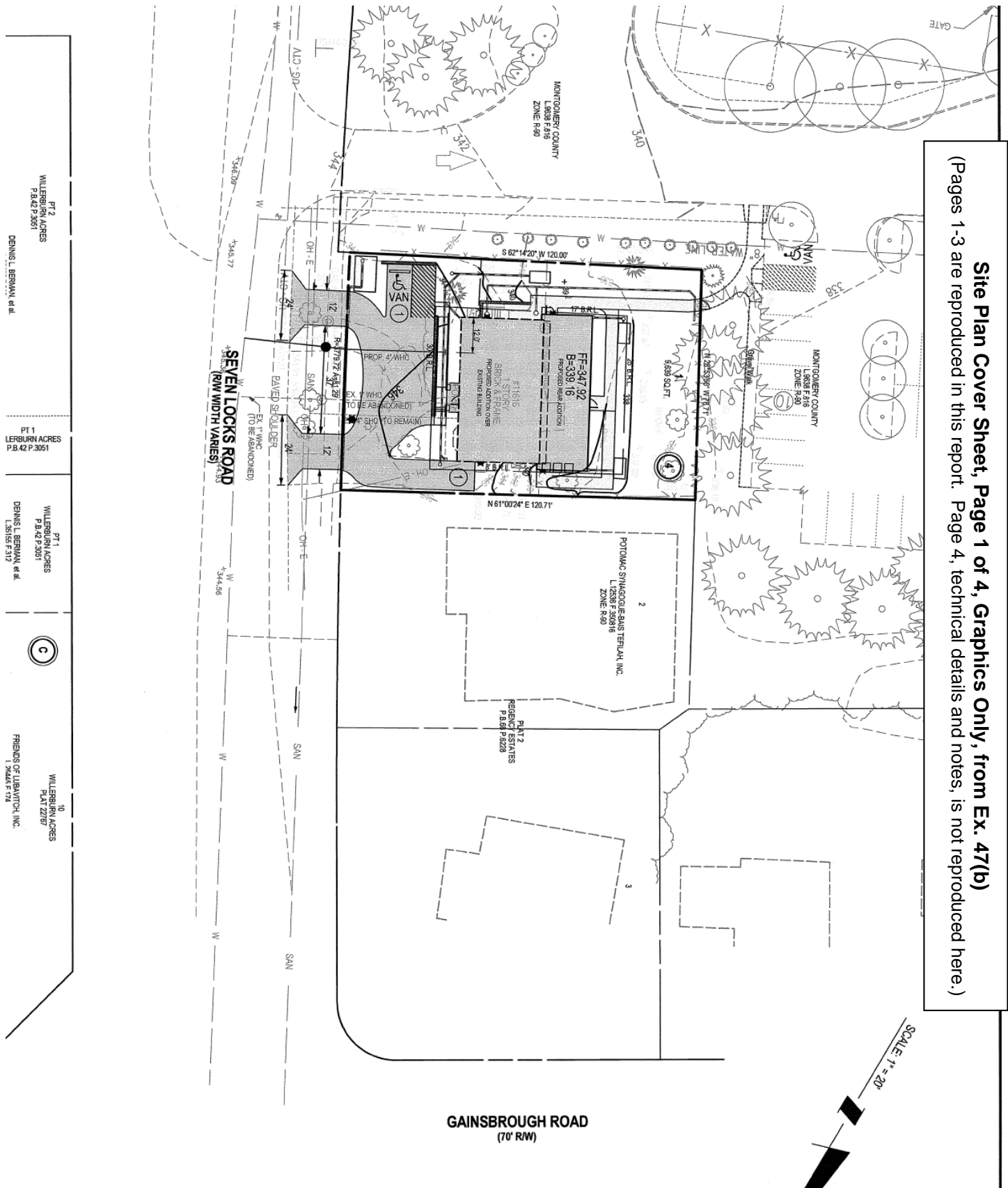
SouthWest Elevation



SouthEast Elevation

Site Plan Cover Sheet, Page 1 of 4, Graphics Only, from Ex. 47(b)

(Pages 1-3 are reproduced in this report. Page 4, technical details and notes, is not reproduced here.)



Site Plan Development Standards Table, from Ex. 47(b)

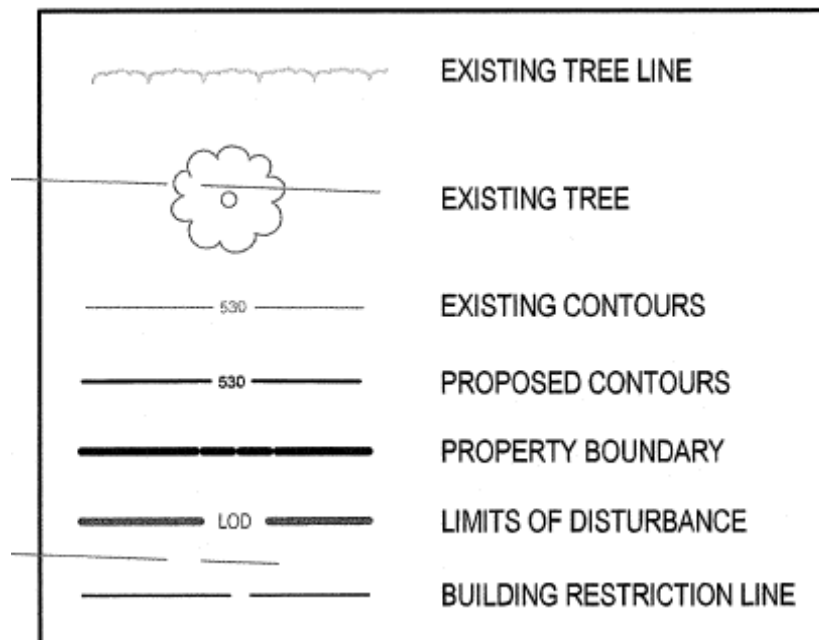
Ivymount Annex Development Standards		
This plan is being developed using R-90 standards		
	Required/Allowed Zoning Ordinance Development Standards for R-90	Proposed
Site Area:		
	9,000 s.f. min.	9,639 s.f. (0.22 ac.)
Existing Zone:		
	R-90	R-90
Existing Gross Floor Area:		
	NA	2,875 g.f.a.
Proposed Gross Floor Area:		
	NA	2,875 g.f.a. total (phase 1) 4,525 g.f.a. total (phase 2) 6,782 g.f.a. total (phase 3)
Building Height (Max.):		
	2 1/2 stories or 35'	35' max.
Lot Coverage:		
	30%	2257 s.f. total (23.4%) 1379 s.f. (phase 1) 878 additional s.f. (phase 2/3)
	2892 s.f.	
Min Width at Front Building Line:		
	75'	80'
Min. Setbacks:		
Setback from Street:	30'	30'
Rear Setback:	25'	25'
Side Setback:	8' one side / sum of both = 25'	8' other side / 17' other side sum of both = 25'
Parking:		
Private Educational Institute	One space for each employee plus safe loading unloading area for students, and student parking	2 spaces and drop off area in front plus shared parking at school and additional spaces off site

Site Plan General Notes, from Ex. 47(b)

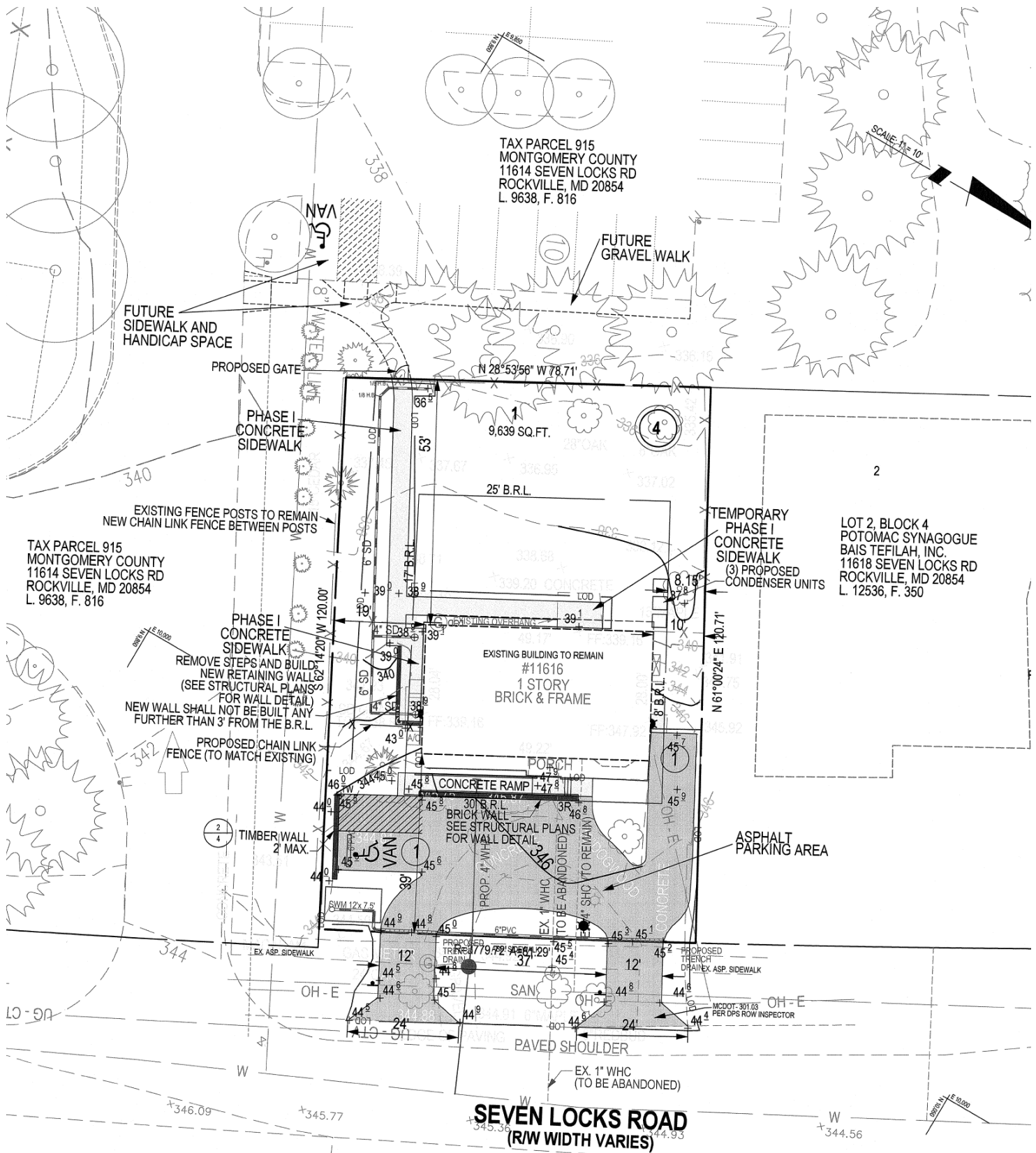
GENERAL NOTES

1. Existing 2' contour interval topography prepared by Loiederman Soltesz Associates, Inc. October 2008
2. Boundary information by Loiederman Soltesz Associates, Inc., October 2008.
3. The subject property is located within WSSC grid 215 NW 08.
4. This project lies within the Potomac Subregion Master Plan.
5. There are no designated historic sites associated with this parcel.
6. Existing Water & Sewer Service Categories: W1/ S1.
7. Grid coordinates are per Maryland State Plane Datum (NAD 83/91).
8. The property is located in the Cabin John Creek watershed.
9. No floodplain exists on site.
10. The Montgomery County Forest Conservation Law does not apply as confirmed by the December 16, 2008 letter from Mary Jo Kishter, M-NCPPC Environmental Planning (see attached letter this sheet).
11. Lot 1 Block 4
Liber: 35019
Folio: 157
Tax Account #: 0010227
12. The Ivymount Annex will be used to house existing educational programs of the Ivymount School. Students and staff members will relocate to the Ivymount Annex from the adjoining Ivymount School's main campus at 11614 Seven Locks Road, Rockville, MD 20854. The staff will continue to park in the main campus lot and in additional leased spaces off site. The number of staff will not increase with the Ivymount Annex, thus additional parking spaces are not needed for the Ivymount Annex. The parking spaces in front of the Ivymount Annex primarily will be used for the drop off and pick up of students that would use the accessible ramp.

Site Plan Legend, from Ex. 47(d) and (e)



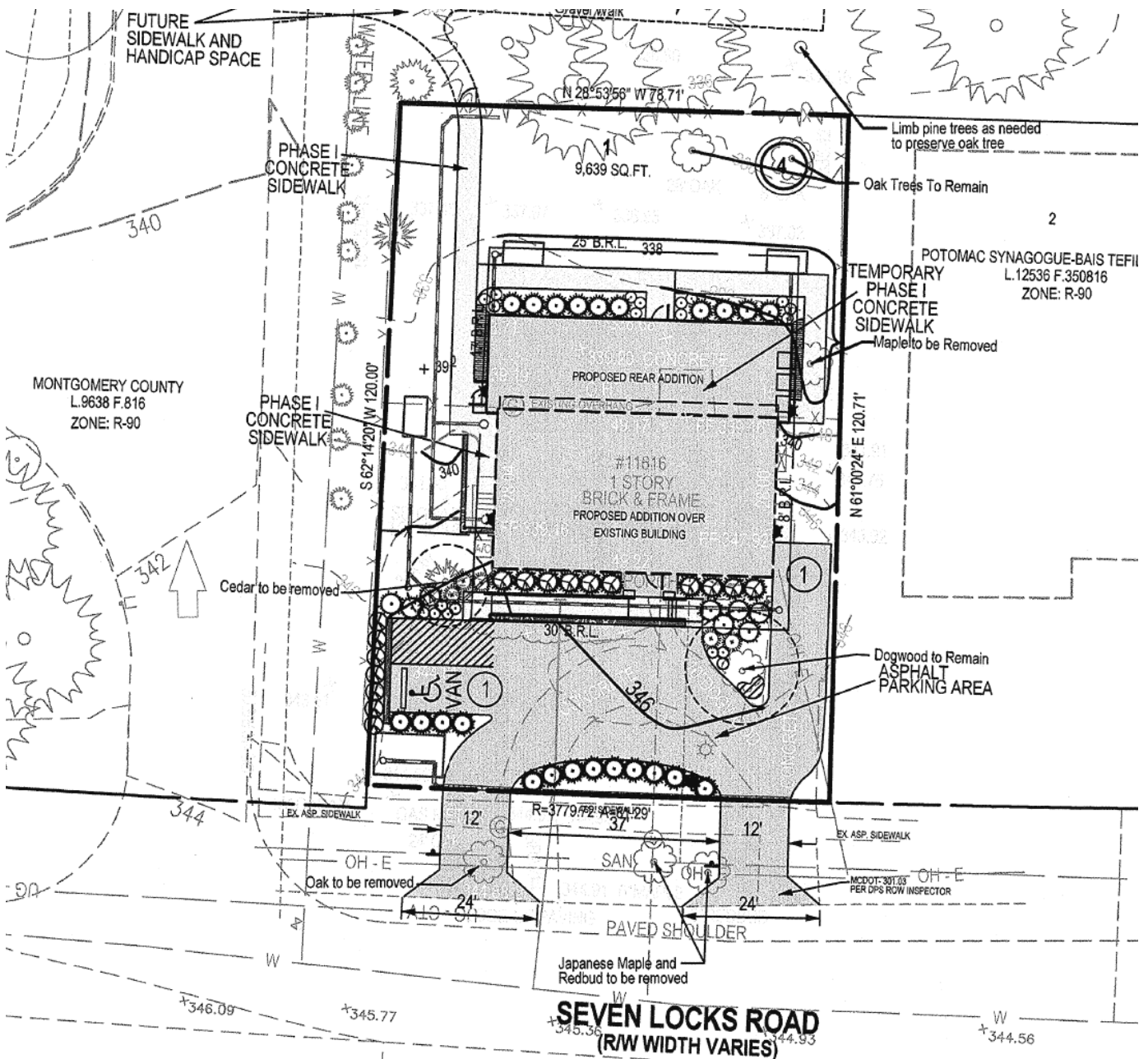
Site Plan Phase 1, Sheet 2 of 4, Graphics Only, from Ex. 47(c)



D. Landscaping, Signage and the Environment

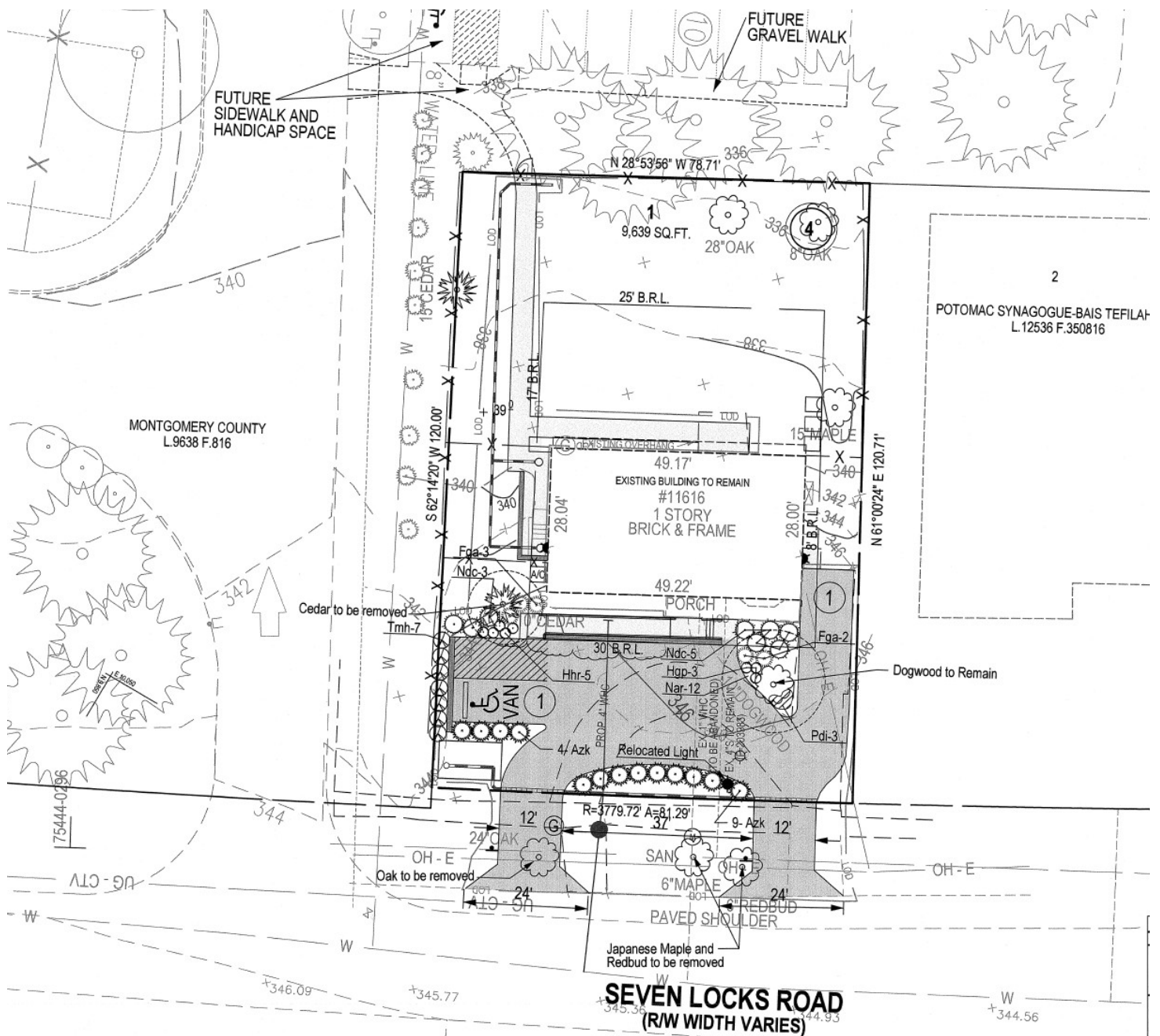
The subject site has grass in front and back, large evergreen trees at the rear, a few deciduous trees, and overgrown shrubs in front of the house. Ivymount proposes to remove the overgrown shrubs and add modest additional landscaping. The overall plan is shown below, followed by plans for Phase One and Phases Two-Three.

Landscape Plan Cover Sheet, Sheet 1 of 3, Ex. 47(h)

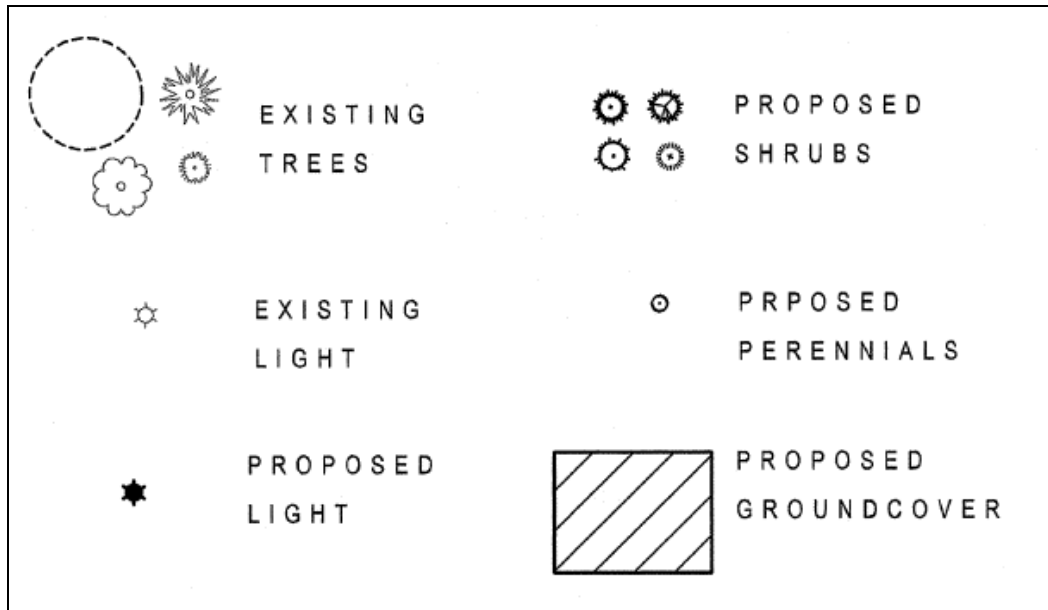


In Phase One of its plan, Ivymount proposes to remove the overgrown shrubs, which could serve as hiding places for a child predator, pave most of the front yard and install hedges, with a top growing height of 3 ½ feet, to soften the view of the paved circulation and parking areas. Phase One landscaping, as shown on the plan below, also would include shrubs and perennials at the front corners of the building. The trees and grass at the rear would remain.

Phase One Landscape Plan, Sheet 2 of 3, Graphics Only, from Ex. 47(i)



Phase One Plant Key, from Ex. 47(i)



Phase One Plant Schedule, from Ex. 47(j) (divided into two parts for space reasons)

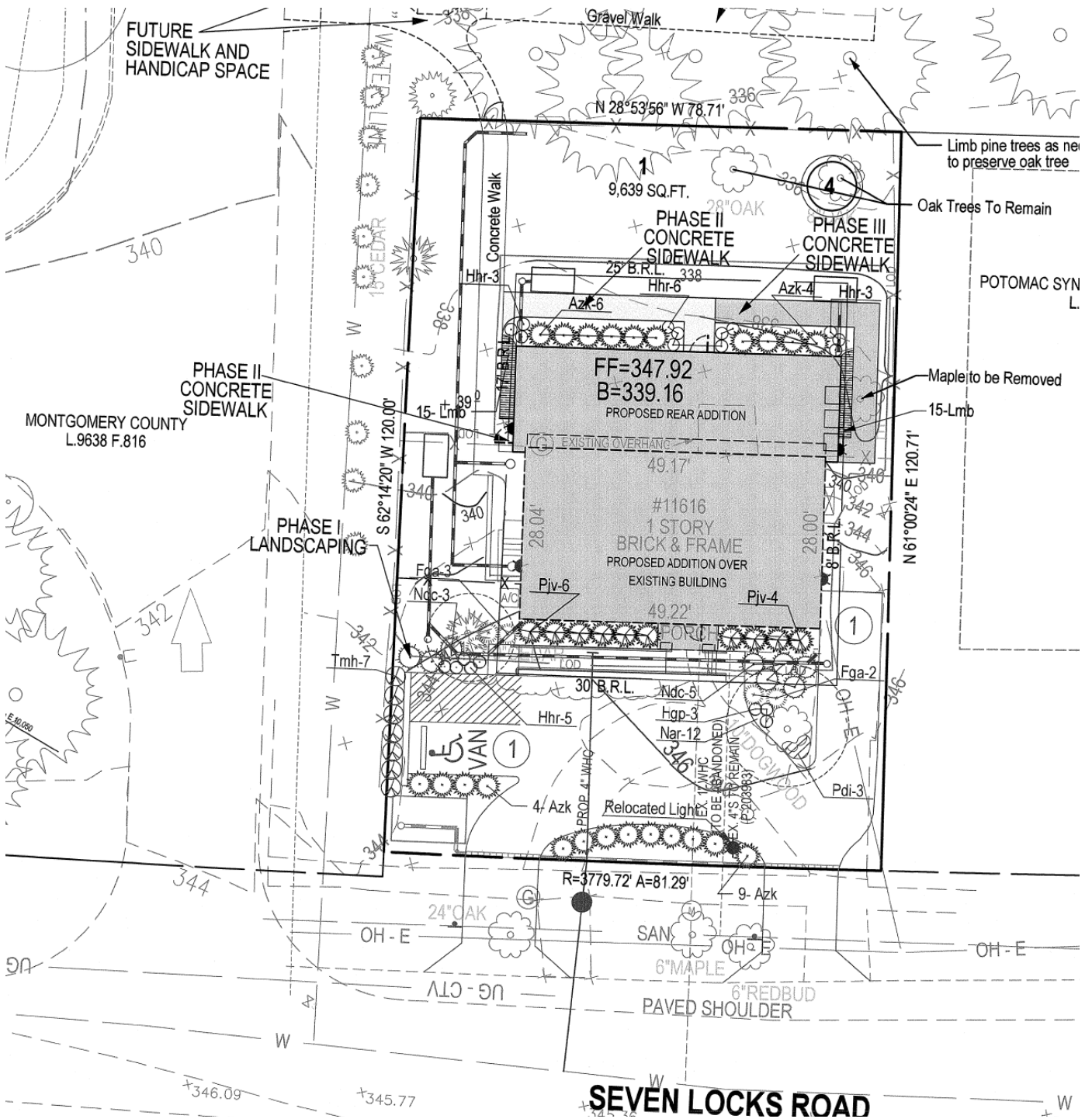
PLANT SCHED			
TYPE	QUANTITY	Code	SCIENTIFIC NAME
SHRUBS	13	Azk	Azalea 'Karen'
	5	Fga	Fothergilla gardenii
	8	Ndc	Nandina domestica 'Compacta'
	7	Tmh	Taxus x media 'Hicksii'
PERENNIALS	5	Hhr	Hemerocallis 'Happy Returns'
	3	Hgp	Hosta 'Golden Prayers'
	3	Pdi	Phlox subulata 'Emerald Blue'
	12	Nar	Narcissus

DULE- PHASE 1

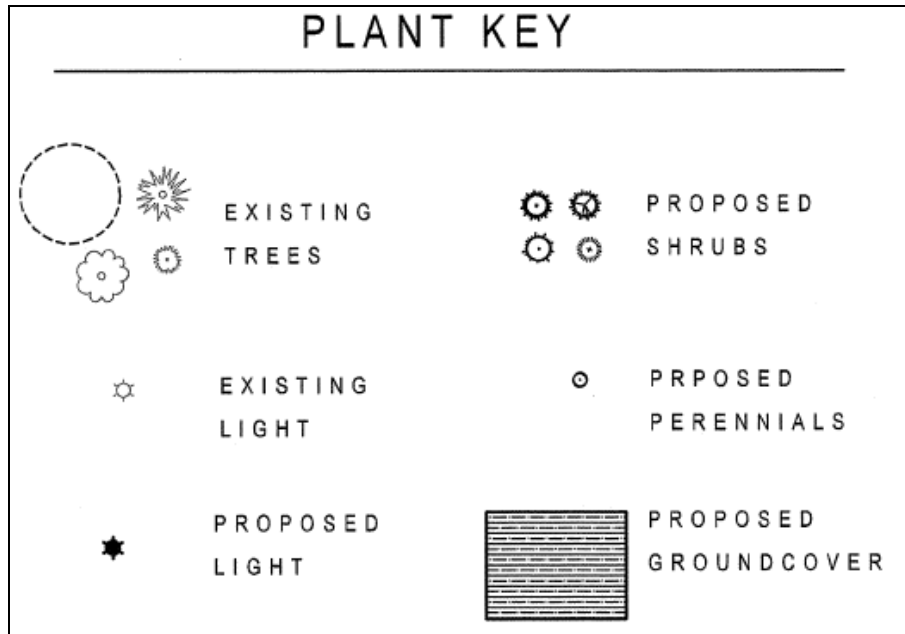
COMMON NAME	HEIGHT/CAL.	B&B/CONT.	REMARKS
Karen Azalea	24-30" ht.	#5 Cont.	
Dwarf Fothergilla	18-24" ht.	#3 Cont.	
Compact Heavenly Bamboo	24-30" ht.	#3 Cont.	
Hicks Yew	30-36" ht.	B&B	
Happy Returns Daylily	12-18"	#2 Cont.	
Golden Prayers Hosta	12-18"	#2 Cont.	
Emerald Blue Creeping Phlox		#1 Cont.	
Daffodil		bulb	Plant Bulbs with hostas by front entry

Proposed landscaping is not broken out between Phases Two and Three, but is depicted as a row of shrubs along the front of the house, a row of shrubs and perennials along the back of the house, and continued preservation of the grass and most of the trees in the rear. One existing tree in the rear is to be removed to make way for a path along the side and rear of the building.

Phase Two and Three Landscape Plan, Sheet 3 of 3, Graphics Only, from Ex. 47(j)



Phase Two and Three Plant Key, from Ex. 47(j)



Phase Two and Three Plant Schedule, from Ex. 47(j) (divided into two parts for space reasons)

PLANT SCHEDULE- PHASE 2			
TYPE	QUANTITY	Code	SCIENTIFIC NAME
SHRUBS	10	Azk	Azalea ' Karen'
	10	Pjv	Pieris japonica 'Variegata'
PERENNIALS	12	Hhr	Heimerocallis 'Happy Returns'
	30	Lmb	Liriope muscari 'Big Blue'

2 (Phase 1 Plants Not Included)

COMMON NAME	HEIGHT/CAL.	B&B/CONT.	REMARKS
Karen Azalea	24-30" ht.	#5 Cont.	
Variegated Japanese Lily of the Valley	30-36" ht.	B&B	
Happy Returns Daylily	12-18"	#2 Cont.	
Big Blue Lilyturf	12-18"	#1 Cont.	

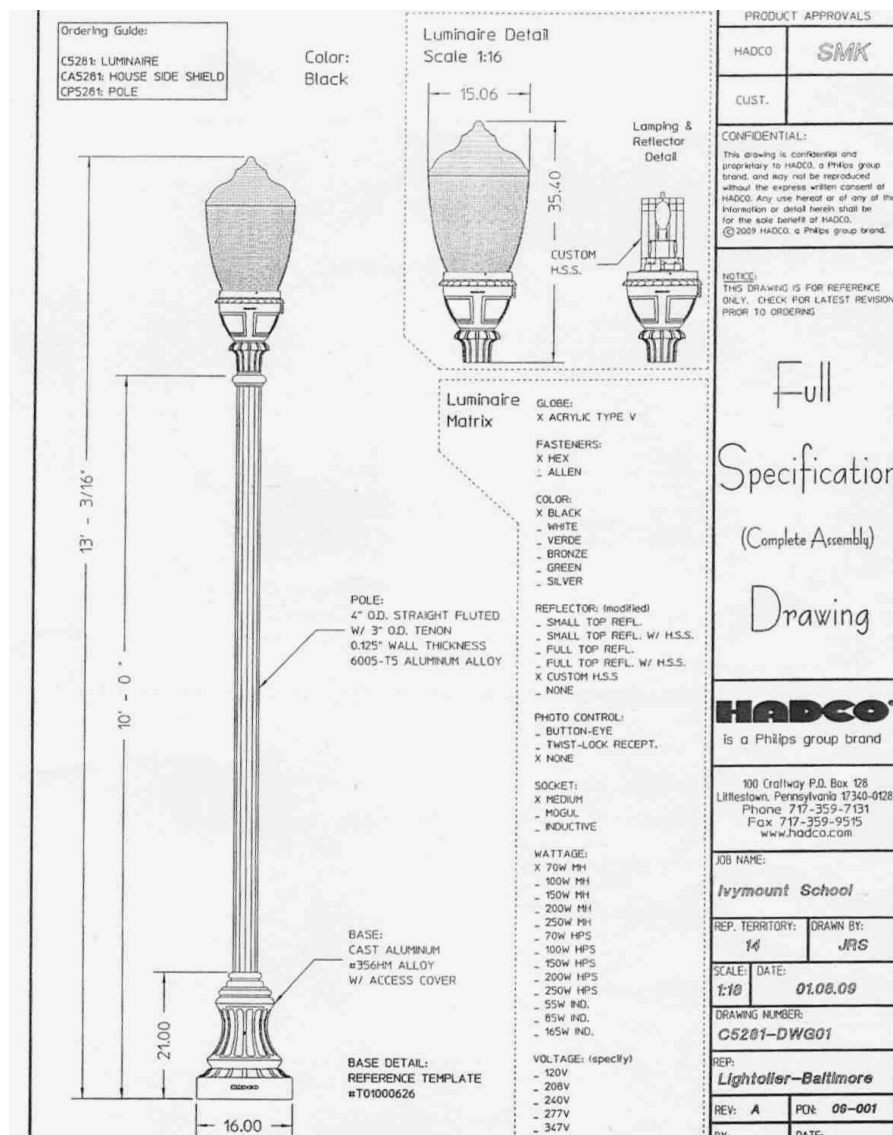
The special exception site contains no natural or environmental features of note, and is not located within a Special Protection Area or a Primary Management Area. It is exempt from forest conservation regulations due to its small size. See Staff Report at circle 13. Environmental Planning Staff at the MNCPPC concluded that the proposed special exception would not create any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity. See Staff Report at circle 14.

Ivymount has not proposed any signage for the annex. The recommended conditions of approval specify that no signage is permitted, to promote a residential appearance and enhance compatibility.

E. Exterior Lighting

Ivymount proposes to replace the pole light that currently sits near the front property line with a new pole light, designed with a cut-off fixture to avoid glare and focus the light downwards. Petitioner's architect described the proposed pole light as a higher grade than is often used, to allow controlled light dispersion, but in a style that is common in residential areas. A cut sheet is shown below.

Pole Light Cut Sheet, from Ex. 5(b)



Ivymount also proposes to install two wall-mounted exterior lights on each side of the building, to light the exit pathways. Two of the new lights would be installed during Phase One and the other two when the rear addition is built, which would add two new exits. All of the wall-mounted lights would be cut-off fixtures that cast light downward to avoid glare. The two lights proposed on the south side of the property, adjacent to the Ivymount main campus, would comply with the stipulation in Section 59-G-1.23(h) that exterior lighting for a special exception in a residential zone must not exceed 0.1 foot candles along the side and rear lot lines. The lights proposed on the north side, however, cannot fully comply with this standard. Petitioner's architect, Chris Parts, testified that because the existing structure is only eight feet from the northern property line, the development team was not able to find a light that would adequately illuminate the exits without casting more than 0.1 foot candles of light at the property line.

The Board has the authority to permit lighting levels that exceed 0.1 foot candles to improve public safety. See Code § 59-G-1.23(h). The photometric plan indicates that on the north side of the property, the proposed wall-mounted lights would result in illumination on the property line ranging from 0.2 to 0.3 foot candles. See Ex. 47(a). Mr. Parts considers this level of light "barely, if at all, visually discernible." Tr. at 143-44. He opined that it would be better to allow the slight light spillage from these lights than to erect some kind of blockage, like a fence. See *id.* at 146-47. This conclusion is supported by a letter from Young Israel Ezras Israel of Potomac, the religious institution that occupies the adjoining property, which voices support for the proposed special exception and states that from the standpoint of both aesthetics and safety, Young Israel would prefer a little light spillage rather than having fencing along the property line. See Ex. 15(c).

The Planning Board and Technical Staff support the proposed lighting for safety reasons and because the adjacent property is a non-residential use. See Ex. 20; Staff Report at 10. The Hearing Examiner agrees that the proposed lighting should be permitted to improve public safety. The proposed lighting would adequately illuminate the building exits for pedestrian safety, and avoiding a fence would maintain visibility between the two adjacent buildings, enhancing safety for anyone on the

grounds after dark. Moreover, the additional lighting was described by Petitioner's architect as barely discernible, supporting a conclusion that it would have no adverse impacts.

F. Development Standards

The proposed building addition would satisfy the development standards of the R-90 Zone, as shown in the table below, adapted from the Staff Report at 8.

Development Standards	Requirement	Provided
Lot Area (§59-C-1.322(a))	9,000 sq. ft.	9,639 sq. ft.
Lot Width (§59-C-1.322(b)): @ Front of Bldg Line @ Street	75 ft. 25 ft.	± 81' ± 81'
Yard Requirements (main building): From Street (§59-C-1.323(a)) From Adjoining Lot Side Yards (§59-G-2.37(b)(3)) One Side Both Sides Rear Yard (§59-C-1.323(b))	30 ft. 8 ft, 25 ft. 25 ft.	±39 ft. 8 ft. ± 26 ft. ± 36 ft.
Building Height (maximum) (§59-C-1.237)	35 ft.	35 ft.
Coverage (maximum net lot area) (§59-C-1.328)	30%	± 24%

G. Traffic

The Staff Report indicates that because the proposed annex would not involve any increase in students or staff, it would generate no new vehicular trips and therefore does not require a traffic analysis. See Staff Report at 4. Petitioner submitted a letter from transportation consultant Street Traffic Studies, Ltd., drawing the same conclusion, i.e. that no traffic analysis is required because the proposed special exception would generate no new trips. The evidence indicates that there would be vehicular trips to and from the annex to transport students to and from job sites, but these are existing trips that would simply move from the main Ivymount campus to the annex. This change would not add to street traffic.

The Street Traffic Studies letter observes that school buses bringing students to and from the main Ivymount campus stack along the shoulder of Seven Locks Road and therefore do not affect

traffic flow on Seven Locks, a contention that neighbors reject. Several community members testified during the hearing that Seven Locks Road is severely congested, and stated or implied that the Ivymount buses contribute to this problem. Jerry Garson, a Board member of the Regency Estates Citizen's Association, argued more particularly that the proposed special exception should be denied because it does not satisfy General Condition (9), which requires that a special exception be "served by adequate public services and facilities including . . . public roads. . . ." See Tr. at 224-26; Code Section 59-G-1.21(a)(9). He declared that although the proposed special exception would not generate any new trips of its own, it would not be adequately served by public roads because Seven Locks cannot accommodate the current Ivymount bus traffic, even if there is no increase. See *id.* at 224. He maintained that MNCPPC records show the intersection of Tuckerman Lane and Seven Locks Road is operating at a level of service of F, showing that existing road service is not adequate. This was in part supported by a post-hearing submission from Street Traffic Studies, which stated that 2003 turning movement counts in MNCPPC files show the intersection of Seven Locks Road and Tuckerman Lane operating at level of service E during the morning peak hour and F during the afternoon peak hour. See Ex. 36(a). These counts are six years old, which significantly weakens their persuasive value (MNCPPC normally permits developers to use traffic counts only if they not more than two years old at the time an application is submitted). Nonetheless, the data provides some support for neighbors' anecdotal testimony that this stretch of Seven Locks Road is congested.

Street Traffic Studies considers the intersection of Seven Locks and Gainsborough Roads more relevant to the subject site than Seven Locks Road and Tuckerman Lane, arguing that the majority of bus traffic probably comes from the north, using Montrose Road, rather than from Tuckerman Lane to the south. See Ex. 36(a). 2008 traffic counts from MNCPPC records indicate that the intersection of Seven Locks and Gainsborough operates at a level of service of B in the morning peak hour and C in the evening peak hour, both of which indicate an acceptable level of congestion. See Ex. 36(a). While the Hearing Examiner finds the bare conclusion that Gainsborough is more relevant than Tuckerman unpersuasive, given the lack of any supporting analysis, the poor levels of service at Tuckerman Lane

and Seven Locks Road must be considered in conjunction with the far superior levels of service -- based on traffic counts that are only one year old -- at Gainsborough Road and Seven Locks, only 200 feet from the subject site

Mr. Garson acknowledged that the intent of the special exception requirements may not be to address existing traffic and existing road conditions, but in his view, the way General Condition (9) is worded suggests an adverse finding in this case. See *id.* at 224-25. He described his experience with traffic issues, which includes serving as Chairman of the Transportation Committee of the Citywide Coalition and Community Boards in New York City for a number of years, and on the Citizens Advisory Board for the Metropolitan Washington Council of Governments, as well as testifying on traffic issues before the State Legislature, County Council and others. He commented on recent experiences waiting through four light cycles to get from Gainsborough Road to Post Oak Road on Seven Locks, which is a distance of a couple of hundred yards. See Tr. at 229. Mr. Garson also observed that when Seven Locks Road is congested, people driving on Gainsborough will stay on Gainsborough and cut through the neighborhood. During rush hour, he maintained, drivers heading north on I-270 will leave the highway on River Road if it is moving slowly, take River to Seven Locks and then use Montrose Road to get back on I-270. See *id.* at 231. Mr. Garson stated that Seven Locks Road meets all the criteria to be designated a major arterial road and could have three or four lanes in each direction, but the community has resisted widening it because they don't want traffic that should be on I-495 and I-270 using Seven Locks Road.

Mr. Garson noted that the congestion on Seven Locks Road creates problems for Ivymount, because its buses have trouble breaking into the stream of traffic on Seven Locks, and that creates back-ups on the school site. Even if the school were planning to reduce the number of vehicles, Mr. Garson would still argue that Seven Locks is not adequate to serve the main school or the annex. See Tr. at 230.

Section 59-G-1.21(9) states that to grant a special exception, the BOA must find that the proposed use would be adequately served by public roads. However, it directs the BOA to consider

this question under the provisions of the Growth Policy in effect when the petition was filed. See 59-G-1.21(9)(B). The Growth Policy's transportation provisions are implemented by Local Area Transportation Review ("LATR") Guidelines adopted by the Planning Board.⁵ The LATR Guidelines, which apply to applicants for special exceptions as well as subdivision and rezoning applicants,⁶ focus on the impact that a proposed development will have on the local roadway network. In keeping with this focus, the LATR Guidelines require no traffic analysis for a development that will generate three or fewer new peak hour trips, which is considered a de minimus impact. The preponderance of the evidence in this case established that, whatever Ivymount's long-term expansion plans may be, converting the subject site into a school annex would not, in and of itself, generate any new vehicular trips. It is not impossible for the BOA to look beyond the LATR Guidelines in an appropriate case, if substantive, probative evidence demonstrates that a proposed special exception is likely to cause adverse traffic impacts that are not captured by an LATR analysis. No such evidence has been presented here. The only non-anecdotal evidence of traffic congestion on this stretch of Seven Locks Road comes from six-year-old traffic counts, while more recent counts at a closer intersection suggest that that congestion levels are acceptable. This is not enough to justify requiring more from the Petitioner than the LATR Guidelines require. In the Hearing Examiner's view, the effect of Ivymount's many buses on traffic conditions is an issue for the Planning Board when it next reviews the County's lease with Ivymount, not for the BOA in considering this petition.

F. Community Participation

All parties involved in this case agree that Ivymount provides excellent educational programs for the special needs population it serves, and all parties support the school's mission. Two parents of current Ivymount students testified movingly about the benefits their children have experienced at Ivymount, and the important role this school plays in educating and training children and young people

⁵ The Hearing Examiner hereby takes official notice of the "Local Area Transportation Review and Policy Area Mobility Review Guidelines" published by the Planning Board following the County Council's adoption of the *FY 2007-2009 Growth Policy* ("2007-2009 LATR Guidelines").

⁶ See 2007-2009 LATR Guidelines at 4.

who cannot be reached in a typical school setting. The record also includes a letter from the President and CEO of the Montgomery Square Citizens Association, a community of approximately 425 families just north of the Ivymount School.⁷ See Ex. 44. The letter states that the proposed use of the subject site would eliminate a long-standing eye-sore while providing an extraordinary educational opportunity for special needs children, and notes that “[a]s with past improvements to Ivymount School, we believe that Ivymount’s plans would have negligible impact on traffic conditions along Seven Locks Road.” Ex. 44.

Several community members testified in opposition to the present application. It was evident that none of them actually opposes the use of the subject site as an Ivymount annex. They participated in this hearing as the only forum they have found to voice their strong opposition to a decision Ivymount made some months ago to evict from its building the Beverly Farms Day Care Center (“Beverly Farms”), a child day care center that has leased space in Ivymount’s building for a number of years and is well-loved in the neighborhood. Beverly Farms serves about 50 children, some of them with special needs and some without. It also employs some of the older students and former students from Ivymount, creating what one parent described as a “genuine experience for growth” for both populations. See testimony of John Erzen, Tr. at 187. This parent also observed how difficult it is to find jobs for disabled young adults, which makes Beverly Farms a wonderful opportunity. Parents of children who attend Beverly Farms, parents of former Ivymount students who work there, and two members of the board of the Regency Estates Citizens Association expressed outrage and dismay at the prospect of losing this day care center.

Ivymount leases its main campus from Montgomery County and subleases space to Beverly Farms. See Ex. 31, tabs 1 and 3. On October 20, 2008, Ivymount wrote to Beverly Farms, forwarding a signed copy of what appears to be a renewal of the sublease and stating that due to Ivymount’s growth and increasing space needs, the sublease will be terminated on June 30, 2011. See Ex. 31, tab 4. The opposition argues that this action violates the terms of Ivymount’s lease with Montgomery

⁷ The author, Robert J. Gross, is also the uncle of a recent graduate of Ivymount’s post-high school program. See Ex. 44.

County. The lease contains language which, on its face, appears to require Ivymount to sublease part of its space for a child day care center like Beverly Farms.⁸ Whether or not the lease actually prevents Ivymount from evicting Beverly Farms is not relevant to the decision before the Board of Appeals; the interpretation of any contractual agreement must be left to the parties to that agreement and the courts.⁹ As the Hearing Examiner explained several times to hearing participants, the Board of Appeals has no authority with regard to the lease agreement between Ivymount and Montgomery County.

The opposition argued that the effort to evict Beverly Farms is relevant to the present case because the proposed special exception is just part of Ivymount's larger expansion plan, and it is the expansion that is driving Beverly Farms out. Opposition witnesses requested that the Board add a condition to the proposed special exception prohibiting Ivymount from evicting Beverly Farms. In the Hearing Examiner's view, the Board does not have the authority to condition the grant of the proposed special exception on continuing a sublease for part of the adjacent property. The basis for the Board's review of special exceptions is potential adverse impacts on the general neighborhood from the proposed use. While the link between the proposed annex and the main Ivymount campus is direct and inextricable, any link between the proposed special exception and possible adverse impacts on the neighborhood from the termination of Beverly Farms' sublease is too tenuous to support the condition the opposition seeks. If Beverly Farms is evicted from Ivymount, the neighborhood could experience harm from the loss of a convenient child day care center, but that would have nothing to do with the Ivymount annex proposed in this case. Moreover, the evidence does not support a conclusion that there is any connection whatsoever between Ivymount's decision to evict Beverly Farms and its decision to seek permission for an annex next door. In fact, logic suggests that denial of the proposed

⁸ The lease includes the following provision 19(c) (see Ex. 31 tab 1 at 21):

Lessee [Ivymount] shall sublease approximately 2,700 square feet of interior space for child day care services. Lessee agrees to continue provision of child day care services of the same size, nature and number of children as currently provided by the Beverly Farms Daycare Center throughout the term of this lease or any extension thereof.

⁹ Maryland case law suggests that the Board of Appeals may make a private agreement part of the conditions of approval for a special exception, with the consent of the parties to the contract. Here, however, the parties to the lease agreement are not the same as the parties participating in the special exception proceedings, and there is no agreement as to the proper interpretation of the lease.

special exception would only intensify Ivymount's space shortage problem, increasing the likelihood of Ivymount following through on its notice terminating the sub-lease.

One community member argued that the main Ivymount campus was originally intended as a community school, and should not be used for a school serving the whole State, due to the neighborhood impacts. This is an argument for the Planning Board when it next reviews Ivymount's lease, not for the BOA in this case. The proposed special exception would neither create nor exacerbate Ivymount's impacts on the neighborhood.

Several community members expressed concerned about the number of students at Ivymount, how much that number had grown in recent years, and whether any government agency places a limit on enrollment. Ivymount objected to answering any questions about these topics on grounds of relevance, but nonetheless provided the information. The Hearing Examiner considers this very basic information relevant to the Board's understanding of the context for the proposed special exception and therefore overrules the objection. Petitioner represents that Ivymount and the Maddux School together have 240 students. See Ex. 40. Ivymount reports that Beverly Farms is licensed for no more than 50 children, but Petitioner does not know how many are enrolled. See *id.* Ivymount has further explained that neither its lease with Montgomery County nor any authorization by the State of Maryland to operate the school contains any limitation on the number of students, although the County has the authority to limit enrollment if it so chooses. See Ex. 42; Tr. at 27-28.

During the hearing, the Hearing Examiner asked Petitioner to consider whether it could accept a cap on the number of students as a condition of the proposed special exception, as a way of giving the neighborhood some assurance that Ivymount is not planning a major increase in its student body (and consequent bus traffic). See Tr. at 203-205. This request recognized that the BOA normally does not impose conditions outside the boundaries of a special exception property, except with regard to traffic improvements. The request also recognized, however, that this is an unusual case, because the proposed special exception could not be approved on the subject property without its ability to rely on the main Ivymount campus for parking and for drop-off and pick-up. Petitioner's chief counsel, David

Freishtat, suggested that Ivymount would be able to come up with an acceptable cap. See *id.* at 203. He pointed out, however, that the number of buses is affected not only by the number of students, but by where they live – new students who live in Montgomery County might be added to existing bus routes, while a single new student from an outlying county that previously has not sent students to Ivymount could result in an additional bus just for that student. See *id.* at 203-204.

After the hearing, Mr. Freishtat reported that Ivymount was not prepared to agree to a cap. See Ex. 35. He objected to the request for a cap, on grounds that Ivymount is not subject to a special exception or any other zoning restriction, and argued that zoning restrictions can only be placed on the use of the proposed special exception property, “not on another property, not related to the use on the property subject to the special exception.” Ex. 35. In the Hearing Examiner’s view, the Board has the discretion to impose whatever reasonable conditions it deems necessary to protect the general neighborhood from the adverse effects of a special exception, including off-site conditions that the petitioner is capable of accomplishing. A good example of such conditions is off-site transportation improvements, which are frequently required of special exception applicants to mitigate adverse traffic impacts. As Mr. Freishtat points out, the present case raises the interesting question of whether the Board may impose a condition that not only requires off-site action, but is designed to mitigate the effects of off-site activity. An off-site transportation improvement is designed to mitigate traffic impacts that would be caused directly by the use proposed on the special exception site. In this case, an enrollment cap would limit adverse effects from Ivymount’s overall operation, not from the use proposed on the special exception site. An overall enrollment cap would be only indirectly related to the proposed annex, which would have a separate occupancy limit. The Hearing Examiner concludes that the Board need not decide here whether it has the authority to impose a condition that would be only indirectly related to the proposed special exception, because the facts in this case argue against it.

First, Ivymount’s enrollment would not directly affect the impacts of the proposed special exception on the neighborhood. Regardless of Ivymount’s enrollment, the special exception site would remain limited to 40 students and 20 staff per the conditions of approval recommended by Technical

Staff and in this report. The proposed conditions of approval further specify that all students must arrive during the morning drop-off and depart during afternoon pick-up using the main Ivymount campus, not the subject site. Thus, no matter how many students attend Ivymount, the impacts of the operation proposed *on the subject site* are unchanged.

Second, Ivymount considers it “imprudent” for anyone to place an “arbitrary restriction” on the number of children enrolled at Ivymount, because the school cannot project whether Montgomery County might ask it to accommodate a few additional children for whom Ivymount is the appropriate setting. See Ex. 35. Moreover, under state law, Ivymount’s staffing needs are governed by each student’s Individual Education Plan, which may change with changes in the student’s profile or in teaching techniques. See *id.* The school is required to comply with applicable state staffing regulations or risk closure by the State. See Ex. 35(b).

In light of these facts, and the important fact that Ivymount does not consent to a cap on its enrollment, the Board need not even reach the question of whether such a condition would be within its authority. Under these circumstances, such a condition is not warranted or advisable.

The opposition also presented evidence and arguments related to traffic impacts, which are addressed in Part II.G above.

Local resident Peter Stocksclaeder presented a petition in opposition to the present application, signed by Regency Estates residents and Beverly Farms parents. The petition was accepted into the record, over the objection of Ivymount’s counsel, with the recognition that petitions receive little weight in special exception cases generally. The weight to be given to the petition is further reduced by the content of the two-paragraph statement at the top of each petition page, which presumably formed the basis of each individual’s decision to sign. The statement referred to Ivymount’s decision to evict Beverly Farms, which is not relevant to the issues involved in the special exception, and stated that the proposed special exception would increase traffic and enrollment, two allegations that are not supported by the weight of the evidence.

III. SUMMARY OF HEARING

A. Petitioner's Case in Chief

1. Janet Wintrol, Director, Ivymount School. Tr. at 8-22; 30-31; 33-52.

Ms. Wintrol has 40 years of experience in regular and special education, mostly in public and private schools in Montgomery County. She was an administrator at Ivymount from 1983 to 1990, left to work at another program, then came back as Director of Ivymount in 1997. She has a master's degree in special education, a bachelor's degree in secondary education and numerous courses and certifications related to educating students with disabilities. She has lived in Montgomery County since 1973.

Ms. Wintrol explained that Ivymount is a nonpublic special education facility certified by the Maryland State Department of Education. She used the word "nonpublic" because although the school is a private facility, almost all of its funding comes from local school systems, subsidized by the Maryland Department of Education ("MDE") through a funding formula related to the State's obligation to educate special needs children. She noted that Ivymount is highly regulated by the MDE, including the level of funding, tuition rates, staffing and licensing. The school is monitored on-site every four to five years and on paper every year.

Ms. Wintrol testified that Ivymount has twice been named a Blue Ribbon School of Excellence. Its mission has not changed since its founding in 1961: to foster independence in its students and to be leaders in the community and in the special education field.

Ms. Wintrol described the admissions process, which involves reviewing material from Montgomery County Public Schools ("MCPS") and other school systems, talking to the family and other people, and deciding whether Ivymount has an appropriate placement. If Ivymount's administrators believe the school does not have a program appropriate for a particular child, they do not accept the child. This may be because the child's needs are too severe, or Ivymount doesn't have the right classroom. Ms. Wintrol stated that the school has accepted a few private-pay families, but because of the intensity of services the school provides – including speech and language therapy, occupational

therapy, behavioral services, social work services and very low student/teacher ratios – the tuition is very expensive, and most parents could not sustain it over a long period of time. She estimated that 99 percent of her students are funded by local school systems.

Ms. Wintrol estimated the combined enrollment at Ivymount and Maddux at 240 to 250, fluctuating from year to year and sometimes during the year. See Tr. at 14. She could not explain why Ivymount's written submission put the student population at 290, but Ivymount's Director of Finance and Administration, Lee-Nadine Oppenheimer, explained that Ivymount and Maddux currently have a combined 250 students (or 240 full-time equivalents, because the Maddux School has some part-time students), and the Beverly Farms Children's Center, which occupies space in the Ivymount building, is licensed for 50 students. See Tr. at 32. Ms. Wintrol and Ms. Oppenheim estimated the number of full-time staff at Ivymount and Maddux at about 240 to 250, plus about 25 part-time staff members. See *id.* at 33.

Turning to the history of Ivymount, Ms. Wintrol stated that that the school was founded in 1961 with one student and one teacher, in a downtown Bethesda church. She stated that from 1961 to 1985 it grew into multiple locations with as many as 130 students. In 1983, the school's programs were consolidated at the subject site, which was a closed elementary school owned by Montgomery County. The focus at that time was on early childhood programs, including working with infants and students up to age 13. Later, Maryland changed its special education funding model, and in 1996 Ivymount extended its student body to age 21, the age up to which federal law mandates education for special needs students. This required a renovation of the physical facilities to deal with the needs of different age groups. When she returned to Ivymount in 1997, Ms. Wintrol observed that the student body had changed. The school was now dealing with more significant disabilities, including students with medical needs requiring full-time nursing care during their educational time, as well as a much larger number of autistic students than in the 1980s. This, she explained, was partly because autism was being better understood and diagnosed in the 1990s.

Ms. Wintrol stated that the reason for the present application is a need for vocational space for older students. She declared that the school does not intend to increase its enrollment or staffing, but plans to move its 18-to-21-year-old students into the proposed annex with existing staff. Right now, Ivymount has 36 students in the 18 to 21 age group. For each of them, the school has to find a job placement and send a job coach with the student.

Ms. Wintrol stated that morning and afternoon student drop-offs and pick-ups are planned to continue as they currently take place, at the main Ivymount campus. The only vehicle trips she anticipates at the annex are a van pulling up in the circular drive to take students to and from their job sites.

Before the hearing, Ms. Wintrol had not given any thought to evening or weekend events at the propose annex, although Ivymount's written submission referred to occasional weeknight and weekend events. She stated that some evening and weekend events might take place at the annex, such as parent evenings where the staff and parents assess each child's needs, a spring pot-luck dinner for students who will be moving into the post-high-school program the next fall, and back to school night. See Tr. at 87-88. After a brief recess, Ivymount's counsel reported that the school would accept a condition limiting evening and weekend events to one per month during the 11 months per year that the school operates. See *id.* at 90.

Ms. Wintrol agreed to the limit suggested by Technical Staff of 40 students and 20 staff members at the subject site at one time. See Tr. at 89. She also agreed to the suggested condition restricting hours of operation to 7:00 a.m. to 6:00 p.m., Monday through Friday, 11 months per year, and deliveries taking place at the main Ivymount campus. See *id.* at 89-90.

Community member Jerrold Garson asked about the number of children at Ivymount, noting that a 2006 Bond Bill that secured additional funding for the school listed the number of students at 202. Mr. Garson asked whether Ivymount's enrollment had increased in the last three years from 202 to the 290 stated in the written submission in this case. Ms. Wintrol suggested that the 290 figure may have included Beverly Farms and certainly included the Maddux program. See Tr. at 41-43. She stated that

enrollment has not fluctuated much at Ivymount in recent years, suggesting that perhaps it was 202 in 2006, some years it is 208 or 210 or 215. See *id.* at 43. Ms. Wintrol emphasized that if the proposed special exception is denied, that will not result in decreasing enrollment at the Ivymount School. See *id.* at 48. The 40 students and 20 staff members she hopes to house in the annex will still be at Ivymount, but in the main building instead of the annex. See *id.* at 51-52.

Ms. Wintrol stressed that the space gained from removing Beverly Farms and its 50 students from the building would not be used to increase enrollment at Ivymount – Ms. Wintrol does not have 50 more students to put in that space. Her student population depends on funding, and recently the numbers have decreased.

Community members also complained about the number of buses coming to the school, which results in buses idling on Seven Locks Road. Ms. Wintrol stated that the number of buses changes from year to year, depending on which jurisdictions send children to Ivymount. Some years she might have two or three students from Carroll County, so that requires a Carroll County bus. Sometimes a student is bussed in from Baltimore County, or from the far reaches of Prince George's County. Ms. Wintrol observed that while the largest number of students at Ivymount come from Montgomery County schools, Ivymount is not a neighborhood school – it serves the State of Maryland. See *id.* at 49-50.

2. Keely Lauretti, landscape architect. Tr. at 52-101.

Ms. Lauretti was designated an expert in landscape architecture. A proposed designation as an expert in land planning was denied based her testimony, which did not demonstrate an expert's understanding of the framework for consideration of a special exception in Montgomery County.

Ms. Lauretti was part of the design team that planned the layout and landscaping for the proposed Ivymount Annex. She was responsible for preparing the site plan and landscape plan. Ms. Lauretti described the setting of the subject property, including the major roadways in the area and the general neighborhood. She also described the Petitioner's plan to widen the driveway, create two handicapped-accessible parking spaces in front of the house, renovate the existing house for use as a

special-needs school, and later expand the building footprint and add a second story. Ms. Lauretti described a proposed walkway in the rear of the site connecting it to the main Ivymount campus, and a hedge near the front property line to screen the paving and parking spaces in front of the house. She noted that the rear and side of the subject property already have substantial landscaping. Ms. Lauretti also observed that the Young Israel Synagogue next door is in a brick building similar to the house on the subject site.

Ms. Lauretti opined that the proposed special exception would not cause a nuisance due to traffic, noise, type of activity or any other element that is incompatible with the character of the surrounding neighborhood. She noted that the proposed special exception would not add more students, additional traffic, or additional outdoor activity other than students moving between the main school and the annex. See Tr. at 76. Ms. Lauretti testified that all deliveries will continue to be made to the main Ivymount campus if the special exception is approved, and that the proposed renovation and expansion of the house would leave it with an exterior that is architecturally similar to and compatible with other homes in the immediate neighborhood. She stated that the house would have brick in front and siding in the rear, which is compatible with other homes in the area, and with the full expansion it would be the same height as other homes in the R-90 Zone. Ms. Lauretti agreed that the proposed special exception would not have an adverse effect on the character or future development of the surrounding residential community. See *id.* at 77.

Ms. Lauretti opined that the proposed special exception would be consistent with the County's general plan and with the Master Plan. She noted that the Master Plan does not include any specific recommendations for the subject property, but it recommends avoiding large number of special exceptions along major roads. Ms. Lauretti stated that even if Seven Locks Road were considered a major road, there are no special exceptions on Seven Locks in the vicinity of the subject site, although other special exceptions do exist in the area. See Tr. at 79-81. She further opined that the proposed special exception would be in harmony with the general character of the neighborhood and would have no detrimental impacts, given that it would have a residential appearance, would not cause an increase

in enrollment or traffic, and would have no deliveries to the site. Ms. Lauretti noted that the proposed use would be served by exiting utilities and nearby fire and police services.

3. Steve Goley, civil engineer. Tr. at 102-136.

Mr. Goley was designated an expert in civil engineering. He first testified that sight distances are adequate from both ends of the semi-circular driveway, using the northern curb cut for entry only and the southern curb cut for exiting only, with proper signage. See Tr. at 104-105; 114. Mr. Goley did not have the figures available to state either what the minimum sight distance requirement is or what the actual sight distance is as he measured it, pieces of information that would have strengthened his testimony.

Mr. Goley testified that the Petitioner has obtained county approval for a stormwater management concept plan. He stated that a very small part of the property drains toward the front, but most of the site drains to the rear, and the proposed development would not change the existing drainage patterns. Mr. Goley observed that the proposed development would have an insignificant effect on the amount of water spilling onto neighboring property. See Tr. at 108. He noted that the stormwater management proposed for the site involves dry wells. See *id.* at 108-109. Much of the water from the roof would go directly into the wells and then seep into the ground without ever reaching the surface, with a net result of reducing the amount of off-site run-off compared to current conditions.

Community member Jerry Garson cited Attachment 7 to the Staff Report, which contains a memorandum from Katherine Holt (apparently an MNCPPC staff member in Vision, formerly known as Community-Based Planning) to Renee Miller, the main Staff Report author.¹⁰ Ms. Holt recommended that Ivymount School coordinate with county employee Aruna Miller about a potential sidewalk project in the vicinity of the subject site. See Tr. at 95-97. Mr. Garson explained that the project involves widening the shoulders within the right-of-way along this part of Seven Locks Road, partly to make more room for the Ivymount school buses. See Tr. at 123. Mr. Goley stated that he has obtained

¹⁰ Mr. Garson raised this issue in cross-examining Ms. Lauretti, but the question was addressed by Mr. Goley.

verbal approval from the County to rebuild the sidewalk in front of the subject site, and he was not asked for anything other than to replicate the existing sidewalk in its current location. *See id.* at 109-110. [In a email submitted after the hearing, Ivymount's site planner, Ms. Lauretti, reported that a Mr. Jon Hutchings (presumably a county employee) has taken this project over from Aruna Miller, and assured Ms. Lauretti that the County plans to do most, if not all of the work within the existing right-of-way. *See Ex. 35(c)*. He also suggested that if more space is needed for buses, the on-road bike lane could be widened to accommodate buses for short periods of time. *See id.*]

Community member Andrew Kavounis, one of the original developers of Regency Estates and a long-time resident, also questioned Mr. Goley about the sidewalk, noting that the plans he has seen for the County's planned project would bring the new right-of-way within 14 feet of everyone's front stoop. *See id.* at 111. Mr. Kavounis also asked Mr. Goley whether the County will permit Ivymount to have four entrances so close together – two on the main school site and two on the subject site. Mr. Goley opined that the proposed driveway openings on the subject site will be approved, based on his discussions with DPS. *See id.* at 112.

Community member John Erzen asked whether the dry wells proposed for stormwater management would raise the water level, and whether this would affect basements in nearby homes. *See id.* at 117. Mr. Goley stated that the water level currently is much deeper than the bottom of the proposed dry wells. In his view, the wells would result in a "very miniscule mounding of water directly underneath of these dry wells"Tr. at 118. He opined that by the time the mounding reaches any of the neighboring properties, the adjoining property to the north being the one most likely to be affected, it will not increase the level of the water table at the location of the basement. *Id.*

Mr. Garson echoed Mr. Erzen's concern about the local water table, noting that in recent weeks the County has done an emergency stormwater management project slightly uphill of the subject site. *See Tr.* at 124-25. Mr. Goley was not aware of this project, nor does he have any detailed knowledge about the water table in the area. Mr. Goley reiterated his opinion that the proposed project and associated stormwater management would only benefit the environment, would have a minimal effect

on the water table in the immediate area, and would have an insignificant impact on the water table as close as 100 feet away. Mr. Garson voiced a particular concern about capacity problems in the open swales that convey stormwater runoff along Seven Locks Road towards the street drains. Mr. Goley stated that only the first 10 or 15 feet of the subject property drains towards the street, so the only impact of the proposed construction would be from a two-foot widening of the driveway, a quantity that he described as miniscule.

Community member Peter Stocksclaeder asked whether the dry wells would have the capacity to handle run-off in significant storms. See Tr. at 130. Mr. Goley stated that the volume of run-off anticipated in connection with the proposed development requires stormwater management to be designed for the “one-year storm,” but not for the two-year, ten-year or 100-year storms that developments with larger volumes of run-off have to target in their designs. See Tr. at 130-31. Mr. Goley did not explore possible impacts on other flood plains or streams in the area, due to the small amount of additional run-off anticipated. He opined that the proposed project would have no detrimental impact on downstream properties.

4. Chris Parts, architect. Tr. at 136-158.

Mr. Parts was designated an expert in architecture. He described his assignment in this project as identifying how the existing house could be expanded to meet the needs of the vocational program. He described interior and exterior improvements proposed to the building, noting that the design would maintain the current brick front along Seven Locks Road, and would have a similar slope to the roof, to maintain a character consistent with other homes in the neighborhood. See Tr. at 142, 148-49, 154.

Mr. Parts stated that if Ivymount stopped using the proposed annex, the building could be converted back to residential use.

Mr. Parts described the proposed exterior lighting, noting that the International Building Code requires any building exit path to be illuminated.¹¹ Accordingly, the exits on the north side of the house

¹¹ Mr. Parts did not explain why no lighting is proposed along the path on the south side of the building. If the special exception is approved and lighting is later found necessary along the south side of the building, Ivymount will need to request a modification of its special exception to submit a revised Photometric Plan showing the additional lighting.

would require lights. Because of the closeness of the adjacent property, only eight feet away, Mr. Parts' company could not find a lighting fixture for those exits that would not exceed 0.1 footcandles at the property line. As proposed, the closer of the two lights would create illumination of 0.3 footcandles at the property line, which Mr. Parts considers "barely, if at all, visually discernible." Tr. at 143-44. Mr. Parts stated that the fixture would be directed down, so it would not cause a glare problem. He opined that it would be better to allow the slight light spillage from both of these lights than to erect some kind of blockage, like a fence. See *id.* at 146-47.

Mr. Parts stated that the subject site currently has a pole light along the front property line, and the proposed lighting plan would replace that light with one that has a cut-off and the capacity to control the level of light produced. He described the proposed pole light as a higher grade than is often used, to allow controlled light dispersion, but in a style that is common in residential areas. See *id.* at 145-46.

B. Community Support

1. John Kennedy, Ivymount parent. Tr. at 160- 165.

Mr. Kennedy testified movingly about the benefits that he, his nine-year-old son Colin and his family have experienced in the four years that Colin has attended the Ivymount School. He and his wife found that at Ivymount they were suddenly surrounded, for the first time, by people who knew exactly how to help Colin. Mr. Kennedy described Ivymount as Colin's favorite place, where he feels like a star. At Ivymount, the teachers understand Collin's strength as a very social child who loves to laugh and joke around, and they use that to motivate him to learn. Mr. Kennedy described Collin as a happy, self-confident child who feels free to show love because he gets so much love at home and at school. He and his wife are at a loss to find a way to thank the special people who work at Ivymount, who have changed the course of their child's life.

Mr. Kennedy submitted his statement, written by his wife, in writing. Attached to it was a brief statement from Collin's 13-year-old brother, Luke. See Ex. 29. Luke described the progress Colin has made at Ivymount, where he has learned to walk, to talk in full sentences, and to control his emotions

much better, reducing the frequency of behavior such as screaming, spitting and hitting. Luke wrote that Ivymount has made a very big change in his family's life.

2. Sari Hornstein, Tr. at 165-170.

Ms. Hornstein is the parent of a young adult on the autism spectrum who has attend the Ivymount School since 1993, and has just turned 21. She testified that Ivymount provides innovative, imaginative and effective approaches to teaching students with complex disabilities, who need intensive, patient, creative and determined teachers to help them develop their skills and broaden their aspirations. Ms. Hornstein described Ivymount's ability to develop programs that actually respond to the needs of children with complex disabilities. She stated that Ivymount is currently looking for creative ways to better prepare students for the challenges they will face as adults, which is why they need the proposed annex to provide space for more comprehensive training and vocational opportunities.

C. Community Opposition

1. Penny Somer-Greif. Tr. at 23-30.

Ms. Somer-Greif lives in the Regency Estates Community and has a son who attends Beverly Farms. She objects to the proposed special exception on grounds that traffic conditions on Seven Locks Road are out of control, with half a dozen buses lined up on the road in front of Ivymount in the mornings, in addition to all the buses on school property. She argued that the proposed special exception would lead to increased traffic impacts. Ms. Somer-Greif took no comfort from Ivymount's representations that the proposed special exception would not lead to increased traffic, contending that although they may say that currently they have no plans to increase enrollment, nothing would stop them from doing so in the future. See Tr. at 26. In response to a question from the Hearing Examiner, Ivymount's counsel explained that Ivymount leases its main building from the County, and the County has the ability to limit enrollment, although no limit has been placed so far. See Tr. at 27-28. Ms. Wintrol reiterated that Ivymount does not intend to increase its enrollment as a result of the proposed

special exception; it intends to use the proposed annex to provide more space for older students' vocational training. See *id.* at 29.

2. Stephen Riley, Tr. at 171-185.

Mr. Riley voiced his complete agreement with the sentiments expressed by Mr. Kennedy and Ms. Hornstein. He has a daughter with special needs who attended Ivymount, and described his and his wife's relationship with Ivymount as a long and happy one. Mr. Riley's daughter now works as a paid staff member at Beverly Farms, which he considers the best evidence of the successful collaboration between Ivymount and Beverly Farms. Mr. Riley noted that it is very difficult to find employment for young people with developmental difficulties, and at Beverly Farms his daughter has been embraced and been successful. He participated in this hearing as part of the Beverly Farms Children's Center Parent Council, which opposes the present special exception. Mr. Riley argued that the present application is part of a multi-year, multi-phase expansion that would disregard Ivymount's "wonderful collaboration" with Beverly Farms over the last two decades.

Mr. Riley maintained that under the terms of Ivymount's lease for the main school property, the County requires Ivymount to lease space in the building to Beverly Farms, consistent with County policy to promote childcare of the size and type provided at Beverly Farms. He argued that Ivymount's need for more space to improve their programs should not come at the expense of Beverly Farms. To relate this lease dispute to the decision before the BOA, Mr. Riley argued that the proposed special exception would result in evicting Beverly Farms from the main Ivymount building by allowing the school to proceed with its multi-year, multi-phase expansion plan. Evicting Beverly Farms, he maintained, would have a detrimental impact on quality of life in Regency Estates and surrounding neighborhoods. See Tr. at 176-77. Mr. Riley's first choice would be for the BOA to grant the proposed special exception, allowing Ivymount to use the additional space, with a condition requiring the school to live up to its lease obligations to the County and Beverly Farms. See *id.* at 178. [The Hearing Examiner admitted a copy of the lease into the record over the objection of Ivymount's counsel, finding that it would have no harmful effect and would aid in building a complete record.]

Mr. Riley noted during and after the hearing an ambiguity in the record as to the number of students enrolled at Ivymount. The Hearing Examiner obtained a basic enrollment figure from Ivymount, which is sufficient for purposes of this case.

3. John Erzen, Tr. at 185-195.

Mr. Erzen has a son who attended Ivymount and now works at Beverly Farms. He agreed with previous witnesses that Ivymount is probably the most wonderful place in the world for special needs children, and “can’t say enough” about everything the school has done to help special needs children integrate themselves into life as adults. Mr. Erzen’s son attended Ivymount until the age of 21, when he received a certificate. He worked at Beverly Farms while attending Ivymount, and continued afterwards. Mr. Erzen stated that Beverly Farms has children with and without special needs, and the atmosphere provides a “genuine experience for growth” for both populations.

Mr. Erzen argued that Ivymount not only needs more space, but has outgrown the region. He noted that the school site was originally a public, community school, intended to be integrated with the community. That use changed when the County decided that the site was too small. Now, Mr. Erzen contends, Ivymount has exceeded the capacity that the public school system would have put on the site, and seeks to expand to the property next door. See Tr. at 188. Mr. Erzen maintained that Ivymount should expand on another site altogether, either by moving the whole school or by moving its upper or lower school program. He considers it inappropriate for a private school to take over an R-90 piece of property.

Mr. Erzen is also concerned that tripling the size of the building on the subject site and putting in dry wells will cause problems in some of the basements in nearby houses. He noted that development in the last 20 to 30 years has removed a lot of open land and increased the level of the water table. In his view, if the special exception is approved it should include a condition that would guarantee there will be no such problems. Based on questions Mr. Erzen asked of the Petitioner’s witnesses, he appears to believe that Ivymount should be financially responsible for resolving any such problems that may arise if the proposed construction takes place.

4. Andrew Kavounis, Tr. at 195-201.

Mr. Kavounis is one of the original developers of the Regency Estates Subdivision and a long-time resident. He noted, anecdotally, that his development company donated the land that was used to build the Ivymount building. His company later sued the County to block it from selling the land and the County lost, which led to the policy of renting out surplus school sites instead of selling them.

Mr. Kavounis emphasized that he is very proud of Regency Estates because of its excellent schools, including Ivymount, and he would not want to harm any of them. He and other Regency Estates residents went to MNCPPC and tried to get an enrollment limit put on Ivymount, like nearby St. Andrews (which operates pursuant to a special exception), and they were told that is not possible. Mr. Kavounis argued that Ivymount should get what it is asking for in this case and more, so they can keep Beverly Farms. He opined that Ivymount's lease requires a sublease to Beverly Farms because the County felt that a subdivision like Regency Estates should also have a day care center.

Mr. Kavounis argued that the proposed special exception should have to stand on its own, with parking on-site, rather than being viewed in combination with the main Ivymount site. He testified that Ivymount has bought other adjacent property for future expansion, as reported in a Gazette article that described a \$7 million expansion at Ivymount in the next four or five years. See Tr. at 200.

5. Peter Stocksclaeder, Tr. at 207-217.

Mr. Stocksclaeder lives on Gainsborough Road, close to the subject property, and his daughter attends Beverly Farms. He or his wife walk their daughter to and from Beverly Farms, typically cutting through the Ivymount parking lot, and they see the lines of buses coming from all points of Montgomery County, Prince George's County, the District of Columbia, Arlington, Alexandria, and sometimes Carroll County and Frederick. Mr. Stocksclaeder described Seven Locks Road as a major commuter thoroughfare. He has often seen five to ten buses sitting on the shoulder of Seven Locks Road, waiting to get into Ivymount's driveway, plus 20 to 30 more buses within the site, lined up in the parking lot. He feels the number of buses raises a safety concern for pedestrians, particularly with the testimony that additional vans would come and go during the day from the proposed annex.

Mr. Stocksclaeder presented an exhibit that used push-pins to show where current students at Beverly Farms live. He prepared the exhibit using the school directory. Ivymount's counsel objected to the exhibit, but was willing to stipulate that almost all the children at Beverly Farms live very close to the Ivymount site. In light of the stipulation and the marginal relevance of the exhibit, it was excluded from the record. See Tr. at 211-212.

Mr. Stocksclaeder harkened back to his college days at a university in Scranton, Pennsylvania, which had purchased a number of former single-family homes in the community to expand its facilities. He observed that issues between community members and the university were worked out through significant community outreach by the school, and he hopes that Ivymount will do the same as it expands.

6. Jerry Garson. Tr. at 217-232.

Mr. Garson is a member of the Board of Directors of the Regency Estates Citizen's Association, although he did not explicitly testify on behalf of the organization. He joined other witnesses in objecting to Ivymount's effort to evict Beverly Farms. He stated that if Ivymount proposed to expand by 50 percent without getting rid of Beverly Farms, the community would probably support that – they just don't want to lose the day care center. Mr. Garson noted that the Citizen's Association has regularly gotten complaints about Ivymount, and they have told people that because of Beverly Farms, it is probably a net plus to the community. Without the day care center, Mr. Garson would find it difficult to persuade people in the neighborhood not to file complaints about the buses, which he contends is for more than the three minutes state law permits.

Mr. Garson opined that a special exception would not be approved for a free-standing school on the subject site with 40 students and 20 staff – the property is just too small. He suggested, therefore, that the subject property and the main school site should be considered a combined property. If a special exception were requested for a private school on the combined property, he argued, an enrollment cap would be imposed. In his view, the BOA should impose limits on the number of students and staff at Ivymount as a whole, not just on the subject site.

Mr. Garson argued that any increase in the number of buses coming to Ivymount would create objectionable noise, vibrations, fumes and odors, and that any increase in student enrollment would cause noise that would impact neighbors. Mr. Garson observed that a school that wants a physical expansion typically ends up increasing the student load, and this school has already increased its enrollment from 202 as listed in a 2006 bond bill, to the 250 testified to at this hearing. See Tr. at 219, 221.

Mr. Garson argued that although his neighborhood does not have many special exceptions, they have many special uses, such as Ivymount, the Geneva Day School and Beth Shalom School (both operating on property owned by religious institutions and therefore without a special exception), and the McLean School, also operating on County property formerly used as a school. He contended that all of these special uses lease parking spaces at Cabin John Mall for their employees, resulting in a parking shortage at the mall. In addition, he noted, the area has Churchill High School on Gainsborough Road, as well as Hoover and Cabin John Middle Schools nearby.

Mr. Garson's testimony about traffic impacts is summarized in Part II.G.

D. People's Counsel

Martin Klauber, People's Counsel for Montgomery County, did not participate in the hearing in this case. He submitted a statement with the following recommendations:

1. That the Hearing Examiner recommended approval of the present application;
2. that the special exception be subject to the conditions recommended in the Staff Report; and
3. that the Hearing Examiner recommended a condition of approval that ties the existence of this special exception to the continued existence of the Ivymount School, i.e. "if and/or when the Ivymount School ceases to exist on the [adjacent] site, this special exception will be abandoned and the Board of Appeals will be notified of the abandonment within 30 days."

Ex. 22. These recommendations are consistent with those at the conclusion of this report.

Community member John Erzen questioned the validity of Mr. Klauber's recommendation, given that he did not see or hear the evidence presented at the hearing. The hearing testimony that was

directly relevant to the Board's decision was consistent with the written materials in the file, so the Hearing Examiner considers Mr. Klauber's recommendations to be based on an adequate foundation.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed special exception, with the conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site." *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a private educational institution. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent

adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Physical and operational characteristics associated with a private educational institution include buildings adequate to house the students and activities; parking facilities; drop-off and pick-up areas for students; lighting; educational activities and events during standard operating hours; a limited number of special events; noise from outdoor recreational activities; students, faculty and support staff on site; and traffic associated with transporting students and staff, as well as supply deliveries and trash pick-up.

In the present case, Technical Staff identified no non-inherent characteristics.¹² The Hearing Examiner agrees for the most part, but not entirely. The building as proposed in its final form would be smaller and more residential in character than most buildings associated with a private educational institution. Because staff parking and student drop-offs and pick-ups would take place on the main Ivymount campus and off-site at the Cabin John Mall, the subject site would have only two on-site parking spaces, and a paved driveway area much smaller than a typical private educational institution. Operating hours would be slightly longer than the standard school day, but in the Hearing Examiner's experience, private educational institutions typically have after-school activities that result in students remaining on site as late as is proposed in this case. Special events would be limited to one per month during the school year, which is a small imposition on the neighborhood and not unusual for private educational institutions, in the Hearing Examiner's experience. The proposed special exception would have no outdoor recreational activities, because those activities would take place on the main Ivymount campus. No peak-hour traffic would be generated, because student drop-offs and pick-ups, staff parking and deliveries all would take place off-site. Outdoor lighting would be modest, and residential in

¹² Technical Staff analyzed a list of inherent characteristics substantially similar to that provided here.

nature. The only element of the proposed operation that the Hearing Examiner considers non-inherent is the length of the school year, which lasts eleven months. The undersigned is familiar with many private educational institutions through past special exception cases, and the standard school year is nine months. Summer operations, when they exist, are typically considered a summer camp, which this office has treated as a non-inherent characteristic not necessarily associated with a private school. An 11-month school calendar is unusual, and is not necessarily associated with a private school. Accordingly, the Hearing Examiner considers it a non-inherent adverse effect of the proposed use.

The Hearing Examiner does not consider the 11-month school year, alone or in conjunction with inherent adverse effects, to warrant denial of the special exception. The proposed use would have modest impacts on the general neighborhood. The most significant impacts would stem from the expansion of the existing house. The completed building would be nearly three times the size of the existing house, and significantly larger than the building to the north, which is used as a religious institution. If the existing house on the subject site and the house next door are representative of home sizes in the neighborhood, the additions proposed on the subject site would result in a building that is larger than most in the neighborhood. The building would, however, be within the limits of the R-90 Zone – meaning that the property owner has the right to construct a building of that size for residential use. Moreover, the style and materials would be consistent with neighboring houses. In addition, the two closest properties are not used for residential purposes, making them less sensitive to possible adverse impact. In the Hearing Examiner's view, the proposed building addition and renovation would be compatible with the general neighborhood. The level of activity on the site would be modest, with outdoor activity limited to arrivals and departures, either on foot, by wheelchair or in vehicles. While the population density would be higher than most private educational institutions, with 40 students on a site slightly smaller than a quarter acre, the impacts of that density would be few because the activities most likely to cause adverse effects for neighbors – morning drop-offs, afternoon pick-ups and outdoor recreation – would continue to take place on the adjacent Ivymount site, unchanged by the proposed

special exception. Extending the modest level of activity on the subject site for 11 months rather than 10 would have no material impact on the general neighborhood.

No unusual site conditions exist that should be considered non-inherent adverse effects.

Based on the preponderance of the evidence, the Hearing Examiner concludes that the inherent and non-inherent adverse effects of the proposed special exception do not warrant denial. The larger question of whether the Ivymount School as a whole should be permitted at this site is beyond the scope of this special exception, and therefore is not addressed in this report. That is an issue for the County and the Planning Board to consider in connection with future renewal of Ivymount's lease.

B. Specific Standards

The specific standards for a private educational institution are found in §59-G-2.19. The Technical Staff report and Petitioner's written evidence and testimony provide sufficient evidence to support a conclusion that, with the recommended conditions of approval, the proposed facility would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.19. Educational institutions, private.

- (a) **Generally.** A lot, tract or parcel of land may be allowed to be used for a private educational institution if the board finds that:
 - (1) the private educational institutional use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity, or any other element which is incompatible with the environment and character of the surrounding neighborhood;

Conclusion: For the reasons stated in Part IV.A. above, the Hearing Examiner concludes that the proposed special exception, if approved with the recommended conditions of approval, will not constitute a nuisance for any of the reasons enumerated in this paragraph (1). The proposed building addition will be consistent with the character of the neighborhood, and operational impacts will be modest.

- (2) except for buildings and additions completed, or for which a building permit has been obtained before (date of adoption [April 2, 2002]), the private educational institution must be in a building architecturally compatible with other buildings in the surrounding neighborhood, and, if the private educational institution will be located on a lot, tract, or parcel

of land of 2 acres or less, in either an undeveloped area or an area substantially developed with single-family homes, the exterior architecture of the building must be similar to a single-family home design, and at least comparable to any existing homes in the immediate neighborhood;

Conclusion: The evidence indicates that if the special exception is approved with the recommended conditions, the proposed building addition will be residential in design and similar in style and materials to existing homes in the immediate neighborhood.

- (3) the private educational institution will not, in and of itself or in combination with other existing uses, affect adversely or change the present character or future development of the surrounding residential community; and

Conclusion: The evidence supports a finding that if approved with the recommended conditions, the proposed special exception will not affect the area adversely or change its character, whether it is considered alone or in combination with other existing uses such as the main Ivymount School. While there is evidence to suggest that Ivymount has some adverse impacts on traffic conditions on Seven Locks Road, the proposed special exception will not add any peak-hour vehicle trips, and therefore will not have any effect on Ivymount's traffic impacts.

- (4) the private educational institution must conform with the following standards in addition to the general development standards as specified in Section G-1.23:

- a. **Density**—The allowable number of pupils per acre permitted to occupy the premises at any one time must be specified by the Board considering the following factors:
 1. Traffic patterns, including:
 - a) Impact of increased traffic on residential streets;
 - b) Proximity to arterial roads and major highways;
 - c) Provision of measures for Transportation Demand Management as defined in Section 42A-21 of the Montgomery County Code;
 - d) Adequacy of drop-off and pick-up areas for all programs and events, including on-site stacking space and traffic control to effectively deter queues of waiting vehicles from spilling over onto adjacent streets; and
 2. Noise or type of physical activity;
 3. Character, percentage, and density of existing development and zoning in the community;

4. Topography of the land to be used for the special exception; and
5. Density greater than 87 pupils per acre may be permitted only if the Board finds that (i) the program of instruction, special characteristics of students, or other circumstances justify reduced space and facility requirements; (ii) the additional density will not adversely affect adjacent properties; (iii) additional traffic generated by the additional density will not adversely affect the surrounding streets.

Conclusion: The Petitioner has requested approval for up to 40 students and 20 staff members on the subject site, which measures slightly less than one quarter of an acre. This represents a density of roughly 160 students per acre. This high student density is acceptable in the present circumstances because the subject site would serve as an annex, with all of the transportation-related impacts and outdoor recreation taking place on the main Ivymount campus. Activity on the subject site would take place primarily indoors, with outdoor activity limited to arrivals and departures on foot and by wheelchair from the main Ivymount campus, and arrivals and departures by van outside the peak traffic periods. It is only these unusual circumstances that justify approving a private educational institution with 40 students and 20 staff members on a quarter-acre of land; all parties to this case agree that a stand-alone private educational institution of this size could not be approved on the subject site.

Technical Staff analyzed the student density on the main Ivymount campus, which is about 29 students per acre and will not be affected by the proposed special exception. The Hearing Examiner considers an analysis of the student density proposed for the subject site to be more relevant.

- b. **Buffer**—All outdoor sports and recreation facilities must be located, landscaped or otherwise buffered so that the activities associated with the facilities will not constitute an intrusion into adjacent residential properties. The facility must be designed and sited to protect adjacent properties from noise, spill light, stray balls and other objectionable impacts by providing appropriate screening measures, such as sufficient setbacks, evergreen landscaping, solid fences and walls.

Conclusion: No outdoor sports or recreation facilities are proposed on the subject site.

- (b) If a Private Educational Institution operates or allows its facilities by lease or other arrangement to be used for: (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, the Board must find, in addition to the other required findings for the grant of a Private

Education Institution special exception, that the activities in combination with other activities of the institution, will not have an adverse effect on the surrounding neighborhood due to traffic, noise, lighting, or parking, or the intensity, frequency, or duration of activities. In evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by the regular academic program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road. A transportation management plan that identifies measures for reducing demand for road capacity must be approved by the Board.

The Board may limit the number of participants and frequency of events authorized in this section.

Conclusion: Ivymount does not propose to allow the subject site to be used for any of the listed activities.

(c) Programs Existing before April 22, 2002. * * * *Not applicable.*

(d) Site plan.

(1) In addition to submitting such other information as may be required, an applicant shall submit with his application a site plan of proposed development. Such plan shall show the size and shape of the subject property, the location thereon of all buildings and structures, the area devoted to parking and recreation facilities, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.

Conclusion: Petitioner has submitted a site plan and landscape plan that include the required elements.

(2) No special exception, building permit or certificate of occupancy shall be granted or issued except in accordance with a site plan of development approved by the board. In reviewing a proposed site plan of development the board may condition its approval thereof on such amendments to the plan as shall be determined necessary by the board to assure a compatible development which will have no adverse effect on the surrounding community, and which will meet all requirements of this chapter. Any departure from a site plan of development as finally approved by the board shall be cause for revocation of the special exception, building permit or certificate of occupancy, in the manner provided by law.

Conclusion: The Hearing Examiner recommends that the Board require one change to the submitted site plan, as specified in the recommended conditions of approval, to avoid any ambiguity regarding the use of the driveway area.

- (e) Exemptions. * * * *Not applicable.*
- (f) Nonconforming uses. * * * *Not applicable.*
- (g) Public Buildings. * * * *Not applicable.*
- (h) Applications filed before May 6, 2002. * * * *Not applicable.*

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and Petitioner's written evidence and testimony provide sufficient evidence that, with the recommended conditions of approval, the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: A private educational institution is a permitted use in the R-90 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would comply with the standards and requirements set forth for the use in Code §59-G-2.19, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The evidence supports a conclusion that the proposed use would be consistent with the *Potomac Subregion Master Plan*, which makes little reference to the subject property except

to recommend continued R-90 zoning, which permits private educational institutions by special exception. The Hearing Examiner finds that the proposed special exception is consistent with the Master Plan's recommendation to avoid large numbers of special exceptions along major roads, despite the fact that Cabin John Mall and its many special exceptions are located not far from the subject site on Seven Locks Road, arguably a major road. The proposed special exception would preserve the residential appearance of the subject site and would not add to local traffic, so it should not be considered to add to the impacts of special exceptions on Seven Locks Road.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale, and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: The preponderance of the evidence supports a conclusion that with the recommended conditions of approval, the proposed use would be in harmony with the general character of the neighborhood. As noted earlier, the proposed annex would have a modest level of activity, particularly outdoors, and would not add to the traffic or other impacts of the Ivymount School on the neighborhood because it would not result in any increase in the number of students, the number of staff or the number of vehicle trips.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval, the proposed use would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, due to its moderate levels of activity and very limited outdoor activities, as well as the residential appearance proposed for the expanded building.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of

any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval, the proposed school annex – which would not increase the number of students, staff, or vehicle trips at the Ivymount School – would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The proposed exterior lighting very slightly exceeds the 0.1-footcandle standard on the north side of the property, but is residential in nature and very unlikely to cause any adverse effect.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Several special exceptions have been identified in the general neighborhood: a community swimming pool immediately west of the main Ivymount campus, one or two home offices, and several retail uses at the Cabin John Shopping Center. Technical Staff reports that there are approximately 220 properties in the neighborhood as Staff defined it, and the addition of the proposed private educational institution would result in approximately 4 percent of the properties having a special exception. See Staff Report at 6. This percentage is based on Staff's general neighborhood; it would be smaller if calculated based on the slightly larger neighborhood that the Hearing Examiner identified. It is also significant that most of the special exceptions in the neighborhood are at a shopping mall, not on a residential block. The Hearing Examiner agrees with Technical Staff that the proposed special exception would not result in an excessive concentration of special exception uses, nor would it increase their number, intensity, or scope sufficiently to affect the area adversely or alter its predominantly residential nature. This conclusion is supported by evidence that the subject site would retain a residential appearance and would have limited outdoor activity.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site,

irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval, the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.
 - (A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.
 - (B) If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.
 - (C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

Conclusion: The proposed special exception will not require subdivision approval. The site is currently served by public services as a residence, and can be expected to receive continued public water, sewer and police and fire protection. Testimony from Petitioner's engineering consultant established that the proposed use would include improved stormwater management systems. The proposed use would have no impact on the public schools.

Community members argued that Ivymount's long lines of buses have an adverse impact on congested conditions along Seven Locks Road, and that the proposed annex would worsen this situation by contributing to or facilitating a larger expansion of the school. One community member contended that the proposed special exception should be denied, even if it is not expected to add new trips, because Seven Locks Road cannot accommodate existing Ivymount traffic, and therefore the subject site is not "served by adequate . . . public roads." As discussed in detail in Part II.G above, the

Hearing Examiner is persuaded by the preponderance of the evidence that the proposed special exception would not create any new trips, and therefore would not exacerbate Ivymount's impact on Seven Locks Road during congested periods. Whether or not Ivymount may have an expansion plan that was not revealed during these proceedings, it is not credible to imagine that such a plan is contingent on getting approval for the proposed annex. Logic suggests that if the annex is approved, Ivymount will feel less pressure to expand on its main campus, not more. Moreover, the County's LATR regulations do not require a special exception applicant to prepare a traffic study if the proposed use would generate three or fewer peak hour trips. As noted in Part II.G, the evidence of traffic congestion in this case is not sufficiently persuasive to justify requiring more from the Petitioner than the LATR Guidelines require. The Hearing Examiner is persuaded that the proposed special exception will have no adverse impact on the public roads or the safety of vehicular or pedestrian traffic, and will be served by adequate public facilities.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that Petitioner has met the burden of proof and persuasion.

59-G-1.23 General Development Standards

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, applicable parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F; must incorporate glare and spill light control devices to minimize glare and light trespass; and may not have lighting levels along the side and rear lot lines exceeding 0.1 foot

candles. Furthermore, under Section 59-G-1.23(g), any structure constructed under a special exception in a residential zone “must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.” Under Section 59-G-1.26, a structure constructed pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted, and must have suitable landscaping, streetscaping, pedestrian circulation and screening.

Conclusion: As shown in the table on page 13, the proposed building addition would satisfy all applicable development standards of the R-90 Zone. Parking and drop-off/pick-up areas would be provided on the main Ivymount campus and by lease with the Cabin John Shopping Center. As discussed in Part II.E above, the Hearing Examiner, the Planning Board and Technical Staff recommend granting the requested waiver of the 0.1-foot candle lighting standard, to improve public safety. The proposed development is exempt from forest conservation requirements because it would not result in clearing any existing forest or trees. See Staff Report at circle 13. No signage is proposed. No new structures are proposed, and the proposed building renovation and addition would result in a structure that is larger than many in the neighborhood, but residential in character, within the development standards of the zone and consistent with the general neighborhood in terms of architectural style and materials. The site would have more paved area in front than most residential lots, but hedges and other landscaping would allow the site to retain a residential appearance.

V. RECOMMENDATIONS

Based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2746, which requests a special exception under Section 59-G-2.19 for a private educational institution, to be operated in an existing structure (proposed for renovation and expansion) located at 11616 Seven Locks Road, known as Lot 1, Block 4, Regency Estates subdivision, in the R-90 Zone, be **granted** with the following conditions:

1. Petitioner shall be bound by all of its testimony and exhibits of record, including the final Site Plan, Exhibits 47(b) through (e), and the final Landscape Plan, Exhibits 47(h) through (j), and by any representations made by Petitioner's counsel that are identified in this report or in the Board's Opinion in this matter.

2. This special exception permits the holder to use the subject property as an annex to the Ivymount School, located on the adjacent property to the south at 11614 Seven Locks Road. If the Ivymount School ceases to operate at 11614 Seven Locks Road, the special exception for the subject site, 11616 Seven Locks Road, will automatically expire. The holder of the special exception is directed to notify the Board of Appeals and the Department of Permitting Services in writing, within 30 days, if the Ivymount School ceases to operate at 11614 Seven Locks Road.

3. Occupancy of the special exception site shall be limited to a maximum of 40 students and 20 employees on site at one time.

4. Hours of operation are limited to 7:00 a.m. to 6:00 p.m., Monday through Friday, eleven months per year, except that special events may be held in the evenings or on weekends no more than once a month during the 11-month school year.

5. The only vehicular trips permitted to occur on a regular basis to or from the special exception site are vehicles taking students to and from job sites. All deliveries must take place on the main Ivymount campus. All morning drop-offs and afternoon pick-ups of students taking place during Ivymount's peak drop off and pick up periods must occur on the main Ivymount campus. Before the special exception can take effect, the Site Plan must be amended to remove the last sentence under General Note 12, which reads: "The parking spaces in front of the Ivymount Annex primarily will be used for the drop off and pick up of students that would use the accessible ramp."

6. All exterior renovations and additions to the existing building must be made with materials that will be compatible with the residential character of the neighborhood, as shown on Exhibit 5(f).

7. No signage is permitted.

8. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits or a use-and-occupancy permit, necessary to implement the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and facility comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: September 25, 2009

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner